

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)**

**ITA No. 832/MUM/2021
Assessment Year: 2017-18**

Patel & Associates,
Office No. 1, 2nd floor, Patel
Bhuvan, 29 Vijay Wad, DR
Nagindas N Shah Lane
ChiraSazar,
Mumbai-400 002.

PAN No. AANFM 8145 P

Appellant

Vs. DCIT CC-7(3),
AayakarBhavan,
Mumbai-400020.

Respondent

Assessee by	:	Ms. AparnaSivakumar, AR
Revenue by	:	Mr. S.G. Menon, DR
Date of Hearing	:	09/02/2022
Date of pronouncement	:	16/03/2022

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against order dated 12/04/2021 passed by the Ld. Commissioner of Income Tax (Appeals)-49, Mumbai [in short 'the Ld. CIT(A)'] for assessment year 2017-18, raising following grounds:

“1. (a) On the facts and circumstance of the case, the ld. CIT(A) failed to appreciate that the ld. Assessing Officer ought to have computed the project profit/loss in the current year since the project was already completed and accordingly should have determined the total income for the A.Y. 2017-18

(b) The ld. CIT(A) erred in facts and law in not appreciating that it was the duty of the assessing authority to correctly assess the income/ loss of the assessee and guide the taxpayer in the proceedings which indicate that any relief is available to him in view of the instructions given by the Hon'ble CDT in Circular No.14 (XL-35) dated 11.04.1955 and only legitimate taxes can be recovered as per Article 265 of Constitution of India.

(c) Without prejudice to I(b) above, the Id. CIT(A) failed to appreciate that the appellate authorities are vested with all the plenary powers to entertain additional/ fresh claims made by the assessee by virtue of the judgements of the Hon'ble Apex Court in the cases of Goetze (India) Ltd. v. CIT |2006| 157 Taxman 1 (SC) & Jute Corporation of India Ltd. v. CIT |1990| 53 Taxman 85 (SC).

2. Without prejudice to above ground no. 1:

(a) The Id. CIT(A) erred in facts and law in not following the principle of consistency as regards the method of accounting followed by the appellant in computing the work in progress of the project by reducing the interest income from it over the past several years already assessed and thereby confirming the addition of interest income of ₹48,73,727/- under the head 'Income from Other Sources'.

(b) On the facts and circumstance of the case, the Id. CIT(A) failed to appreciate that it was out of commercial expediency that the surplus funds of the assessee were temporarily parked to reduce the overall running project cost and was inextricably linked to the project.”

2. Briefly stated facts of the case as culled out from the record are that the assessee is a firm engaged in the business of development and construction of properties. The assessee undertaken a construction project namely “Trishul Goldfield” at CBD Belapur, Navi Mumbai. The assessee has claimed to have completed this project in the year under consideration. For the year under consideration, the assessee filed return of income on 25/10/2017, which was found defective and the assessee rectified

the defect and filed the return under section 139(9) of the Income Tax Act, 1961 (in short 'the Act') on 01/03/2018 declaring total income at ₹21,82,660/-. The return of income filed by the assessee was selected for scrutiny assessment, which has been completed on 10/12/2019 under section 143(3) of the Act and total income has been assessed at ₹68,98,450/-. In said order, the AO rejected the claim of treating interest receipt as part of business income. Instead, he assessed the interest receipt of ₹48,73,727/- under the head "income from other sources" and also declined set off of interest expenditure against the said interest receipt. After separating, the interest receipt, he computed the balance business income at ₹20,24,723/- as per the method declared by the assessee. Aggrieved, the assessee filed appeal before the Ld. CIT(A) and submitted that there is an overall loss in the development of the concerned real estate project, whereas the assessee had been wrongly declaring 10% profit on the actual expenses incurred on the project every year. The Ld. CIT(A) without attending the request (i) claim of the assessee for computing correct profit from the project and (ii) treating interest receipt as business income, upheld the action of Assessing Officer of assessing interest receipt of

₹48,73,727 under the head “income from other sources”. He also rejected contention of allowing interest expenses to the extent of ₹23,72,608/- i.e. proportionate interest expenditure in the ratio of loan advanced to total unsecured loan received. Aggrieved with the finding of the Ld. CIT(A), the assessee is in appeal before the Tribunal, raising the grounds as reproduced above.

3. The ground No. 1 (One) of the assessee is related to grievance that method of computation of business income by the assessee for the last many years including year under consideration is incorrect and therefore, the Assessing Officer should determine the correct business income.

4. The Brief facts qua, the issue in dispute are that during the year under consideration the assessee has determined profit of ₹72,70,272/- at the rate of 10% on expenditure incurred during the year of rupees of ₹7,27,02,725/- including net interest paid of ₹6,46,25,298/-. The assessee adopted its own method of recognizing profit at the rate of 10 % of the actual expenses incurred on the project every year, which is then, included in the value of the closing work in progress (WIP) at the year end. The said

method of recognizing income has been consistently followed since commencement of the project till assessment year 2018-19. The contention of the assessee before us is that the assessee has inadvertently recognized profit each year, whereas the assessee suffered a loss in the project. The assessee has provided a chart of profit declared since 2010-11 till 2018-19 following this consistent method, which has been reproduced by the Ld. CIT(A) on page 5 of the impugned order as under:

A.Y	Profit (₹)	Remarks (% Profit)
2008-09	0	-
2009-10	0	-
2010-11	13,54,487/-	5%
2011-12	43,25,133/-	8%
2012-13	82,59,821/-	10%
2013-14	1,17,10,903/-	10%
2014-15	61,73,341/-	10%
2015-16	49,87,539/-	10%
2016-17	62,71,502/-	10%
Total upto 31.03.16	4,30,82,726/-	
2017-18	72,70,272/-	10%
2018-19	78,25,038/-	10%
Total	5,81,78,036/-	

5. Before the Ld. CIT(A), the assessee has also filed a table computing loss of ₹6,36,89,063/- on the project, following project completion method, which is reproduced as under:

Particulars	Amount (₹)
Sales	18,45,95,070/-
Add: Closing Stock	48,40,63,345/-
Less: Op Cum WIP	48,32,39,218/-
Less : Opening Stock	
Less : Project Expenses	7,27,02,725/-
Less : Cost of Land	17,64,05,535/-
(Loss)/Profit	(6,36,89,063/-

6. Before us the Ld. counsel of the assessee has contended that a fresh claim of computing correct profit (loss) from the project should have been admitted by the Ld. CIT(A) following project completion method, rather than profit from project recognized by the assessee in the return of income following consistent method of computing business income. The Ld. CIT(A) has rejected this claim of the assessee observing as under:

“7.3.5. The assessee has filed a detailed submission that it was following wrong method of accounting and that the income offered as per percentage completion method was computed incorrectly. It is, however, found that the assessee has offered income following the same, method in previous assessment years as well and this was the method followed consistently. The assessee has not revised its return of income in earlier assessment years or in the

year under reference to rectify the method claimed to be incorrect. I have considered the facts of the case and submissions of the assessee. Section 139 of the Act governs the filing of return of income. Sub-section (5) of section 139, permits a person, who has filed the return of income as required under section 139(1) or in pursuance of notice under sub-section (1) of section 142, to file a revised return, if the assessee discovers any omission or wrong statement therein. The revised return is to be filed at any time before the expiry of one year from the end of the relevant assessment year or before the completion of assessment, whichever is earlier.

7.3.6. An assessee, after filing the return of income may, at a later stage, realise that a claim allowable under the Act has been omitted or the quantum thereof is not correct. If the return has been filed by the due date as prescribed and a period of one year from the end of the relevant assessment year has not elapsed, he may revise the return by filing a revised return. However, in this case, it is an admitted fact that the assessee has not claimed the deduction in the return of income, neither filed any revised return of income.

7.3.7. In the case of Jute Corporation of India Ltd V. CIT [53 Taxman 85 (SC)], the Hon'ble Apex Court has held that the CIT(A) has a power coterminous with the Assessing

Officer. Furthermore, in the case of Goetze (India) Ltd. v. CIT 284 ITR 323 (SC), it was held by the Hon'ble Apex Court that the claim of deduction not made in the return cannot be entertained by the Assessing Officer otherwise than by filing a revised return.

7.3.8. In the case of the assessee, it is evident that the claim of recasting its profit and loss account made by the assessee is a fresh claim and not a revised claim. The assessee has not made the claim in the return of income, neither filed any revised return of income claiming the same before the AO. In this regard, I am of the considered view that this claim of the assessee tantamount to not only revision of the Return of Income for the year under reference but earlier years as well. If I go into the facts of the case, it is clear that the assessee wants to get relief by rectification of mistake in the return of income of multiple assessment years. The mechanism is provided in Section 139(5) of the Act which state that an assessee can revise return of income at any time before expiry of one year from the relevant Assessment Year or before completion of assessment, whichever is earlier. The current AY. is AY.2017-18 and the time limit for revising return expired on 31.03.2019. The submission to get above relief was made during assessment proceedings when the assessee was not entitled to revise its income. The Parliament in their wisdom

has envisaged this situation, where the assessee may make some mistakes which may adversely affect him and provided a mechanism to correct the same by way of provision of revised return but put a time limit to the same. Accepting this submission will amount to circumventing this provision and further put assessee to a position of advantage against other assesses having made mistakes but their cases are not under scrutiny, which would not be proper.

7.3.9. In this regard, it is pertinent to note that the Act provides another mechanism to get the relief in such situations by way of provision of Section 119(2)(b), which provides that the Board may authorize an Income-tax authority to admit an application or claim for any relief under the Act after the expiry of period provided under the Act. In this case, it is not even a claim of any deduction not claimed or assess income offered wrongly. The assessee is offering 10% as income following percentage completion method. Now when the project is completed the claim of the assessee is that the method followed for offering the income was incorrect, the assessee never made any effort to correct the same by revising return of income. This contention is raised only when the AO proposed to tax the interest as Income from Other Sources." The assessee wants the AO to recast its profit of loss account for multiple assessment

years. In fact, if the contention of the assessee is accepted, this will be a case of rejection of books of account and determination of income as per provisions of section 145 of the Act. Thus, in effect the assessee wants its income to be revised by the O by way of submission in respect of which he has been time barred by the law and beyond time line of revised return. The remedy is available with the higher authority as prescribed in section 119(2) (b) of the Act. Thus, accordingly, admitting and accepting this claim of the assessee will tantamount to circumventing both the time limits prescribed by the law and the higher authority with whom the power vests. Therefore, in my considered view, otherwise also power didn't vest even with the AO, therefore, he cannot be issued a direction to exercise a power which does not vest with him.

7.3.10. In CIT v. Pruthvi Brokers & Shareholders Pvt. Ltd.(supra), it was held by the Hon'ble Bombay High Court that the appellate authorities have the discretion whether or not to permit such additional claims to be raised. In this case, in the given facts and circumstances of the case, I am of the considered view that the additional claim of the assessee was a fresh claim and not a revised claim and the same was as per the method followed by the assessee from the beginning of the project and the assessee not only wish to revised its income for this assessment year but for earlier

assessment years as well by way of this claim of having been showing income incorrectly, hence, the same could not be entertained more so when alternative mechanism for recourse is available in the Act itself which could be availed of as prescribed in section 119(2)(b) of the Act. Grounds are accordingly Partly Allowed.”

7. In our opinion, the Ld. CIT(A) is not justified in rejecting the request of the assessee for admitting the claim of correct computation of business income and advising for revising return of income of earlier years. The assessee is seeking a legitimate request for assessing the income as per the provisions of the Act and the Ld. CIT(A) is entitled to admit such claim in view of the decision of the Hon'ble Supreme Court in the case of **Jute Corporation of India Ltd Vs CIT 284 ITR 323(SC)**. The case of **NTPC Ltd versus CIT (1998) 229 ITR 383 (SC)**, also the Hon'ble Supreme Court has held that where all facts are on record and no investigation of fresh facts is required, the appellate authorities are entitled to accept additional ground of claims. The Central Board of Direct Taxes (CBDT), which is an apex body of administration of direct taxes, has also issued instruction by way of circular No. 1(XL-35) dated 11th April 1955 to assessing authorities to guide the assessee for

correctly computing the income. In the case of **Dunlop India Ltd vs Union Of India And Ors, reported in 1977 AIR 597, 1976 SCR (2) 98**, the Supreme Court held as follows:-

"At one stage Mr. Sanghi pointed out that in certain Bills of Entry of Dunlop India Limited, their Agents, Messrs Mackinnon. Mackenzie & Co., Private Ltd., gave the I.T.C. item No. 87 with regard to the imported V.P. Latex. This according to Mr. Sanghi clearly shows how the appellants themselves have understood the matter. There is, however, no estoppel in law against a party in a taxation matter. In order to clear the goods for the customs, the appellants' Agents may have given the classification in accordance with the wishes of the authorities or they may even be under some misapprehension. But when law allows them the right to ask for refund on a proper appraisalment and which they actually applied for, we do not attach any significance to this aspect of the matter pointed out by counsel. The question is of General importance and must be decided on its merits."

7.1 In the instant case before us, also the assessee has declared profit for last many years not following correct method for determination of profit from real estate project, but that does not bar the appellate authority to decide the true profit and the authority is bound to adjudicate the issue in accordance with law. If

something is provided in law and not claimed by the assessee under misapprehension, then if sought remedy by way of additional ground before the Ld. CIT(A), he is required to admit said claimed decide in accordance with law as there is no esptoppel against the law.

7.2 In the case of real estate business, there are two recognized methods of computing business profit. The first method is percentage completion method, where the profit is computed from sales in proportion to the percentage of the project completed. The second method, where an assessee carry forward the cost incurred from year to year and declare the profit on sales in the year of completion of the project. In the instant case before us the assessee in earlier years has neither followed percentage completion of method for recognizing profit nor followed project completion method. The assessee declared profit in the rate of 5-10% on the project cost incurred in every year. The assessee also carried forward cost incurred in the profit declared thereon as working progress to subsequent year. The claim of the assessee is that in actual, the cost of expenditure on the project is more than the sales

realized and therefore assessee suffered loss from the project. In our opinion, the Ld. CIT(A) should have admitted the claim of the assessee and verified the actual loss from the project. In view of the facts and circumstances of the case and decision of the Hon'ble Supreme Court cited above, we admit this ground of the appeal of the assessee seeking computation of correct profit. We accordingly set aside the order of the Ld. CIT(A) on the issue in dispute and restore the matter to the file of the Ld. Assessing Officer for working out correct profit from the project. We find that while carrying forward the cost of work in progress, the assessee had included profit declared in every year to the cost of work in progress, which the Assessing Officer may consider for subtracting while working out the actual cost incurred on the project. The ground No.1 (One)of the appeal of the assessee is accordingly allowed.

8. The ground No. 2(Two)of the appeal relates to treating interest received of ₹48,73,727/-under the head 'income from other sources'. The contention of the assessee that it was consistently declaring the said receipt under the head 'business income' and therefore in the year under consideration also the said income

should be treated as income from business income. Whereas the Assessing Officer has pointed out that during the year under consideration there was no business activity and therefore there was no requirement of depositing money with banks for any business purpose. The relevant finding of the Assessing Officer is reproduced as under:

“4.9. The assessee in his own submission dated 02.12.2019 has submitted that during the course of business, the idle funds which were to be utilized in the project were temporarily parked with the banks in fixed deposits. Thus it can be seen that the interest income was on the deposits which has no direct link with the project of the assessee. The assessee in their own submission dated 20.11.2019 has stated that the project is 100% completed. Further as discussed above that during the year, no expenditure was incurred for the purpose of construction. Thus the assessee has failed to establish that the interest income was on the funds borrowed for the project and temporarily lying idle with them. Thus it can be seen from the above that the decisions of the Hon'ble Supreme Court relied upon by the assessee are not applicable to the facts of the assessee's case. In fact, the Hon'ble Supreme Court in the case of Karnal Co-operative Sugar Mills Ltd. (118 Taxman 489)

relied upon by the assessee has held that surplus fund lying idle deposited in the banks for earning interest income cannot be termed as capital receipts. The other important fact is that the assessee has not shown any income from its business of developing and construction during the year even though the project is completed. In view of the above interest income received during the year of R 48,73,727/- which includes interest income on bank deposits is treated as "income from other sources" without allowing net off against the interest expenditure as claimed by the assessee. Penalty proceedings initiated u/s.270A of the Income-tax Act, 1961 for under reporting of the income."

9. The Ld. CIT(A) also upheld the action of the Assessing Officer following same reasoning.

10. Before us, also the assessee could not justify direct nexus and claim of necessity of making deposits for business purpose. The Ld. CIT(A) has rightly held that in the year under reference project of the assessee had already completed, then argument of the assessee of keeping borrowed fund invested and withdrawn as and when required for the purpose of the business, does not hold good. In the facts and circumstances of the case, we do not find any error in the finding of the Ld. CIT(A) on the issue in dispute and accordingly, we

uphold the same. The ground No. 2 of the appeal of the assessee is accordingly dismissed.

11. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open Court on 16/03/2022.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: **16/03/2022**
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai