

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "A", MUMBAI
BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No. 476/Mum/2021 (A.Y. 2012-13)

Dy.CIT-14(1)(1),
Room No. 432, 4th Floor,
Aayakar Bhavan, Churchgate,
Mumbai-400020.

..... Appellant

Vs.

M/s AYG Realty Ltd.,
No. 1, Rajkamal, CST Road,
Kalina, Mumbai-400098.

PAN: AAACC4637J

..... Respondent

ITA No. 1558/Mum/2020 (A.Y. 2012-13)

Choudhury & Choudhury India Ltd.
(Now known as AYG Realty Pvt. Ltd.),
No. 1, Rajkamal, CST Road,
Kalina, Mumbai-400098.

PAN: AAACC4637J

..... Appellant

Vs.

The CIT (Appeals)-22,
Room No. 513, 5th Floor,
Earnest House, Nariman Point,
Mumbai-400021.

..... Respondent

Assessee by : Sh. Firoz Andhyarujina &
Sh. Manek Andhyarujina
Revenue by : Sh. Mehul Jain, Sr. DR
Date of hearing : 26/05/2022
Date of pronouncement : 28/07/2022

ORDER

PER GAGAN GOYAL, A.M:

This appeal by the Revenue is directed against the order of Ld. Commissioner of Income Tax (Appeals)-22, Mumbai [for short "Ld. CIT (A)] for the Assessment Year (AY) 2012-13. In ITA No. 476/Mum/2021, the Revenue has raised the following grounds of appeal:

1. "Whether Ld. CIT(A) is right in law and facts to have not exercised powers that are co-terminus with that of the Assessing Officer to examine the issue and not pass order on general hypothesis"

2 -Whether the Ld.CIT(A) is right in law and facts in not invoking the applicability of section 41(1) for cessation of liability since the fact that the assessee has not been able to produce confirmation for sundry creditors outstanding"

3 The Appellant prays that the order of the CIT(Appeals) on the above ground be set aside and that of the Assessing Officer be restored.

4. The Appellant craves leave to amend or alter any ground or to submit additional new ground, which may be necessary."

2. In ITA No. 1558/Mum/2020 the assessee has raised the following grounds of appeal:

"1. The Hon. Commissioner of Income Tax(A) has erred on facts and in law overlooking the reality of the business that the Appellant is involved in the business of construction of building, bridges etc, at several places/sites and the Appellant has to pay large amount of cash to the daily wage earners and to make purchases even on Sundays and Holidays, at different places/sites such as Aamby Vally-Lonavala, Dr. BATU, Lonere, NBCC, Latur, C.P. Office, Mumbai Sawai Madhopur, Rajsthan., Pimpri Chinchwad Municipal Corporation site at Bhosari, Pune etc., when the wages are being paid or purchases are to be made in mofussil area or in case of accident etc., large cash amount is required.

2. The Hon. Commissioner of Income Tax (A) has erred on facts and in law overlooking several judicial pronouncements upholding the payment in cash.

Considering the business necessities. The cash amounts were transferred only for the business exigencies of the company and not for personal use. Moreover, there is neither any doubt nor allegation with regard to genuineness of transaction at the assessment or appellate level.

3. The Hon. Commissioner of Income Tax (A) has erred on facts and in law disregarding the fact that this was not case of unexplained cash receipts/payments, but the transactions are duly recorded in the Payers/Receiver's books and disclosed. The same were reported in the Financial Statements of all concerned entities for all these years, where the management and ownership are common/same and nowhere/never adverse view was taken by the Assessing authorities all these years.

4. The Hon. Commissioner of Income Tax(A) has erred on facts and in law in ignoring ground realities that the appellant do not have any holiday and the work has to be carried out even on Sundays and Bank holidays and the Income Tax Act, itself allows exception in such cases.

5. The Hon. Commissioner of Income Tax (A) has erred on facts and in law overlooking several judicial pronouncements upholding the fact that it is a common trading practice to transact amongst sister concerns in case of emergencies and such transactions between sister concerns are not covered by either of the provisions of Sec 269SS or 269T of Income Tax Act, 1961 as confirmed by the judicial authorities in various judgment.

6. The Hon. Commissioner of Income Tax (A) has erred on facts and in law disregarding the interpretation of provisions of Income Tax Act, 1961; which makes it abundantly clear that loan and deposits are only covered under the provisions of Sec 269SS and 2691 and not the advances amongst the family members or associate companies. Even Rule 2(b)(ix) under the Companies Act, 2013 makes it abundantly clear that "a deposit does not include any amount received from a director or a shareholder of a Private limited Company"

7. The Hon. Commissioner of Income Tax (A) failed to understand that the amount so borrowed/paid was:

(a) during the course of business

(b) was from/to the companies under the same Management and

(c) the appellant have not paid / received any interest on the same

(d) the outstanding balances are also duly reflected in the Balance sheet of respective companies and full disclosure was made in the statements of Accounts.

(e) the amount of cash paid / received did not amount to a loan or deposit and there was no loss of revenue.”

3. Brief facts of the case are that the assessee has filed his return of income for AY 2012-13 on 24.09.2012 declaring total income at Rs. 1,32,56,306/- The case was selected for scrutiny under CASS and statutory notices u/s 143(2) and 142(1) dated 05-08-2013 were issued and duly served. The assessee is into the business of civil engineers and contractors.

4. During the year under consideration assessee has declare turn over of Rs 22,13,33,097/- and other income of Rs 13,28,275/- over which it has declared net profit of Rs 10796682/-. During the assessment proceedings A.O. made *ad hoc* additions on account of sundry creditors for the purchase of material @ 20% amounting to Rs 11241367/-. Same *ad hoc* addition was made @20% on account of sundry creditors for expenses amounting to Rs 30246494/-. She further made additions of Rs 7550000/- on account of cash receipts and payments over Rs 20000/-.

5. Aggrieved with this order assessee preferred an appeal before Ld. CIT (A)-22 Mumbai. The Ld. CIT (A) observed as under against the findings of A.O.

“ I have considered the facts of the case and submissions made by the appellant. The AO has added 20% of the outstanding balance as on 31.03.2012 on account of the same being unverifiable. The other reason for this addition that the AO noted that there is a difference in the opening balance of Sundry Creditors for Expenses as on 31.03.2011 in the details submitted by the appellant and the Balance Sheet and accordingly she has held that the Balance Sheet does not reflect a true and correct picture of its affairs. As regards this difference, the appellant has submitted that the details filed before the AO were list of parties that had an outstanding balance

at the end of the year and did not include those accounts that were squared off during the year and brought forward from earlier years. It was stated that the AO did not ask for this reconciliation and straight away proceeded to hold that the Balance Sheet does not reflect the true affairs of the business of the appellant. I am in agreement with the submission of the appellant that Balance Sheet is a result of accounting system and merely stating that the Balance Sheet is not correct as the opening balance of an item filed by the appellant does not match with the opening balance of that item in the Balance Sheet is not enough. The AO should have asked for the reconciliation of this difference. The reconciliation that was provided by the appellant to this office was sent to the AO for remand report. In his remand report, dated 23.08.2019 that has been duly forwarded by the Range Head vide letter of even date, the AO has not made any comment on this reconciliation filed by the appellant. I have also gone through the reconciliation and hold that the observation of the AO that the Balance Sheet does not reflect the true affairs of the state of the appellant as the opening balance of one item as filed by the appellant does not match with the opening balance of that item in the Balance Sheet is not correct. The second issue arising out of the addition made by the AO is the amount on which the disallowance is to be done. The action of the AO in disallowing certain percentage of the closing balance on an estimate basis is not correct since in many cases these amounts pertain to earlier years and cannot be added back in the instant year. If at all, the disallowance can be done only of the amount added during the year. As regards the verifiability of these creditors, it is seen that these creditors have a running account with the appellant and transactions with them have taken place in earlier and subsequent years also. These creditors also include credit cards balance from banks such as Bank of India, HSBC, State Bank of India and Standard Chartered Bank. The appellant has also filed copy of assessment order dated 30.03.2016 for the next year ie, AY 2013-14 in which the returned income has been accepted and neither the Balance Sheet nor any of the creditors have been doubted. Further, no details are available with respect to any of the creditors being an entry provider and issuing bogus bills. In view of all these facts, the addition made by the AO amounting to Rs.1,12,41,367/- being 20% of outstanding balance of sundry creditors for material purchased and Rs.3,02,46,494/- being 20% of outstanding balance of Sundry Creditors for Expenditure cannot be sustained and the entire addition of Rs.4,14,87,861/- done by the AO on estimate basis is deleted. This ground of appeal is therefore allowed.”

6. The findings of Ld. CIT (A) as mentioned supra, were made with reference to the disallowances discussed supra and the findings of A.O where she justified

these additions on account of following issues/deficiencies she found during the assessment proceedings as under:

- i) Non filing of confirmations of the sundry creditors for purchases
- ii) Discrepancies in the opening balance as per balance sheet and submissions made by the assessee
- iii) Balance sheet of the assessee doesn't reflect a true and fair view of its affairs.
- iv) Notices issued u/s 133(6) were not responded by the parties.

7. We have gone through the order of the A.O., order of the Ld. CIT (A) and submissions of the assessee along with paper -book filed. We have considered the remand report sent to the office of Ld. CIT (A) by the office of A.O. also. Deficiencies marked by the AO are not sustainable (i) As assessee had filed confirmations of sundry creditors for purchases (ii) Discrepancies in the opening balance as per balance-sheet and submissions made by the assessee has been duly reconciled and filed before the Ld. CIT(A) and we have also considered the same and found to be correct (iii) As per AO balance-sheet of the assessee does not reflect a true and fair view of its affairs is not sustainable as she did not rejected the books of accounts, hence, this finding of her is contradictory and not sustainable and (iv) Notices issued under section 133(6) of the Act were responded by the parties before the Ld. CIT(A) and on this aspect, Ld. CIT(A) asked for a remand report from AO, hence, this allegation is also not sustainable.

8. Considering the facts of the case, submissions of the assessee and additional evidences filed before Ld. CIT (A) and accepted by him considering the remand report of A.O., we are of the considered view that order of A.O. was not

sustainable and findings of Ld. CIT (A) on merits of the case are sustainable hence the grounds of appeals raised by revenue is **dismissed. In the result, appeal of the Revenue is dismissed.**

9. Now, we are coming to the appeal filed by the assessee in ITA No. 1558/Mum/2020 (A.Y. 2012-13)

10. All the grounds raised by assessee are interlinked and for sake of synchronisation disposed of by common finding.

11. During the year under assessment based on tax auditors report A.O. made an addition of Rs 19,50,000/-and Rs 56,00,000/- as cash receipts and cash payment respectively. We have gone through the form no 3CD (Tax Audit Report) and submissions before the authorities below made by the assessee. We found the tax auditor reported these two items of cash receipt and cash payment shown under the column of loan and deposits accepted during the year and not under the column for disallowances to be made u/s 40A(3). These two transactions are in the nature of amounts taken / paid in cash from sister /associate concerns. **As assessee has not claimed amount of Rs. 19,50,000/- and Rs. 56,00,000/- as expense in its Profit & Loss A/c, therefore, it cannot be disallowed.**

12. Looking at the nature of transactions it is no-where proved that the same can be treated as income u/s 28 or can be disallowed u/s 40A(3) or any other section of the act. At the max both the transactions can be considered for the purposes of section 269SS and section 269T, subject to the clarification of the assessee and various judicial pronouncement in this regard. **Hence, we hereby direct to delete addition/disallowance of Rs 75,50,000/- made by A.O. and sustained by Ld. CIT (A).**

13. As far as issue of applicability of sections 269SS, 269T r.w.s. 271D and 271E are concerned as no action so far has been taken against the assessee by the A.O. in the result there is no cause of grievance made out by the assessee on which this tribunal can adjudicate hence, challenging the initiation itself is not allowed hence, found to be infructuous.

14. In the result, appeal of the assessee is **partly allowed**.

Order pronounced in the open court on 28th day of July, 2022.

Sd/-
(KULDIP SINGH)
JUDICIAL MEMBER

Sd/-
(GAGAN GOYAL)
ACCOUNTANT MEMBER

Mumbai, दिनांक / Dated: 28/07/2022

SK, Sr.PS

Copy of the Order forwarded to:

1. अपीलार्थी / The Appellant ,
2. प्रतिवादी / The Respondent.
3. आयकर आयुक्त (अ) / The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय. अपी. अधि. , मुंबई / DR, ITAT, Mumbai
6. गार्ड फाइल / Guard file.

BY ORDER,

//True Copy//

(Dy. /Asstt. Registrar)
ITAT, Mumbai