

**IN THE INCOME TAX APPELLATE TRIBUNAL,
'RANCHI' BENCH, KOLKATA
[VIRTUAL COURT HEARING AT KOLKATA]**

**Before Shri Rajpal Yadav, Vice-President (KZ)
&
Shri Manish Borad, Accountant Member**

**I.T.A. No. 105/RAN/2017
Assessment Year: 2010-2011**

M/s. P.K. Upadhyay,.....Appellant
Thana Toli, Chandwa,
Latehar, Jharkhand-829203
[PAN: AABFU4596N]

-Vs.-

Income Tax Officer,.....Respondent
Ward-3(5),
Bye Pass Road, Daltonganj, Palamau,
Jharkhand-822101

Appearances by:

No n e, appeared on behalf of the assessee

Shri N.K. Khalkho, Sr. D.R., appeared on behalf of the Revenue

Date of concluding the hearing : May 10, 2022

Date of pronouncing the order : August 3, 2022

Per Rajpal Yadav, Vice-President (KZ):-

The assessee is in appeal before the Tribunal against the order of Id. Commissioner of Income Tax (Appeals) dated 06.02.2017 passed for the assessment year 2010-11.

2. In response to the notice of hearing, no one has come present. In the past also, nobody has appeared on behalf of the assessee except once when assessee sought adjournment. We have been issuing notice time and again by Registered Post. Hence, in the absence of any representation at

the end of the assessee, we heard the appeal *ex-parte* and proceed to decide it on merit with the assistance of ld. D.R.

3. The assessee has raised six grounds of appeal. Out of that, Ground No. 6 is general ground, which does not call for recording of any specific finding. Hence it is rejected.

4. In Grounds No. 1 & 2, the assessee has challenged the validity of reopening of the assessment by issuance of a notice under section 148 of the Income Tax Act. This ground was not taken by the assessee before the ld. 1st Appellate Authority. It has been taken for the first time before the Tribunal. The assessee has neither filed paper book nor placed on record copy of reasons for reopening of the assessment. A perusal of the statement of facts filed before the ld. 1st Appellate Authority, no submission is discernable. The original assessment order was passed under section 143(3) on 31.12.2012. A notice under section 148 of the Income Tax Act was issued on 24.03.2015, i.e. within four years from the end of the relevant assessment year. Therefore, the interdiction available in the proviso appended to section 147 puts an embargo upon the powers of the ld. Assessing Officer for reopening of the assessment in the cases where scrutiny assessment was made and four years have expired. This protection is not available in the present case. In the absence of complete details, we are at a loss to record any specific finding on this aspect. It is difficult for us to appreciate whether the reopening of assessment is justifiable or not. The appeal is lying in the Tribunal since 2017, i.e. more than five years have expired, but not a single step has been taken by the assessee to place on record copies of the reasons. It is also pertinent to note that the appeal is on the Board since 19.04.2018. Therefore in the past also, the assessee has not taken any step to buttress its Ground No. 1 & 2. Hence, these grounds are rejected.

5. **Ground No. 3:** In this ground, the assessee has pleaded that the ld. CIT(Appeals) has erred in confirming the addition of Rs.5,55,280/-.

6. Brief facts of the case are that the assessee has filed its return of income on 06.12.2010 declaring total income of Rs.3,18,050/-. The case was taken up for scrutiny assessment and assessment order was passed under section 143(3) on 31.12.2012. The ld. Assessing Officer has determined the total income of the assessee at Rs.3,52,780/-. In the reopened assessment, the ld. Assessing Officer perused the record and recorded a finding that the assessee has debited a sum of Rs.5,11,164/- in the assets side of the balance-sheet on account of time extension, whereas the total amount of time extension comes to Rs.10,66,443/-. He noticed a discrepancy of Rs.5,55,280/- and accordingly he made an addition of this amount.

7. Appeal to the ld. CIT(Appeals) did not bring any relief to the assessee.

8. With the assistance of ld. D.R., we have gone through the record carefully. It is pertinent to observe that the assessee was engaged in civil construction and other activities. The time extension amounts are those funds, which the contractee does not disburse to the contractor on account of the contractor's failure to complete the work on time. In other words, it is an amount, which was retained by the contractee for not completing the contract work in time. The total amount retained by the contractee under time extension was Rs.10,66,443/-. Out of that, Rs.5,11,164/- has been claimed by the assessee. It was shown on the assets side of the balance-sheet to be realised subsequently. Thus the ld. Assessing Officer was of the view that the balance amount ought to be recognised as a revenue receipt or it should be included in the gross contract receipts. On the other hand, the assessee has submitted that total amount retained ought to be debited from the assets side of the

balance-sheet. On due consideration of the above facts, there is no dispute with regard to its admissibility. A small error crept in the accounts and the ld. Assessing Officer failed to give due credit to the assessee. The ld. Assessing Officer has noticed complete details of contract's gross amount, security deduction, sales tax, etc. in a tabular form on page no. 4 of the impugned order. One of the Divisions, i.e. PIURW had a time extension amount of Rs.5,55,280/-. If it was not to be allowed to be debited from the assets side, then the ld. Assessing Officer should have verified this fact from this Division instead of disbelieving the version of the assessee. This approach is not justifiable. Therefore, we allow this ground of appeal and delete this addition.

9. **Ground No. 4:** In this ground of appeal, grievance of the assessee is that the ld. CIT(Appeals) has erred in confirming the addition of Rs.34,13,698/-.

10. Brief facts of the case are that there are two components:-

Labour Charges	Rs.17,65,010
Material Charges	Rs.16,48,688/-
Total	Rs.34,13,698/-

According to the ld. Assessing Officer, the assessee failed to deduct TDS under section 194C of the Income Tax Act and, therefore, he disallowed both the items.

11. On due consideration of the facts and circumstances, we are of the view that the Revenue Authorities are not justified in making the above disallowance because on purchase of material, no TDS was required to be deducted by the assessee. Similarly it was submitted by the assessee that at different places, work was going on, where labours were hired. This single account was for maintaining the details otherwise there was no

sub-contract agency available. Labours were directly hired and employed by the assessee. If it was given to sub-contractor, the assessee could be held liable for deduction of TDS, but no such provision is applicable when labours were hired by the assessee directly on the sites. Therefore, we allow this ground of appeal and delete the disallowance.

12. **Ground No. 5:** In this ground of appeal, the grievance of the assessee is that the Id. CIT(Appeals) has erred in confirming the disallowance of Rs.8,20,511/-, which was disallowed by the Id. Assessing Officer out of interest and remuneration paid to the partners. The finding of the Id. CIT(Appeals) on this ground reads as under:-

"8.4. I have considered the submissions of the appellant and have also perused the assessment order. Section 2(23) of the Act defines 'firm' as a firm shall have the meaning assigned to it in the Indian Partnership Act, 1932 (9 of 1932).....". Section 4, 5 and 6 of the Indian Partnership Act, 1932 state:-

"Section 4- DEFINITION OF "PARTNERSHIP", "PARTNER", "FIRM" AND "FIRM-NAME".

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually, "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm-name".

Section5 PARTNERSHIP NOT CREATED BY STATUS. The relation of partnership arises from contract and not from status; and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

Section6:- MODE OF DETERMINING EXISTENCE OF PARTNERSHIP. In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together. Explanation I : The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

Explanation II : The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not itself make him a partner with the persons carrying on the business; and, in particular, the receipt of such share or payment –

(a) by a lender of money to persons engaged or about to engage in any business.

(b) by a servant or agent as remuneration,

(c) by the widow or child of a deceased partner, as annuity, or

(d) by a previous owner or part-owner of the business, as consideration for the sale of the goodwill or share thereof, does not of itself make the receiver a partner with the persons carrying on the business.

8.5. *It is clear from the above that to qualify as a partnership there has to be a relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all and there needs to be a contract. In the case of the appellant the contract was awarded to the individual and not the firm. The contract receipt was received in the joint account purportedly not that of the firm. There is not proof that the partnership firm existed in the impugned Assessment Year and held an independent PAN. The appellant claims that the Partnership Deed was executed on 01.04.2002 and therefore, for the current Assessment Year it also automatically existed. This contention of the appellant is not true as the partnership could be for a specific venture (section 8 of the Partnership Act. The facts that have been brought on record show that the contract was awarded to the individual and not the firm. The contract receipts were received in the joint account not that of the firm. No evidence could be submitted to show that it was the firm which had executed the contract. As regards the authenticity of the Partnership Deed dated 01.04.2002, even if the same is considered to be genuine it automatically and also in face of the evidences to the contrary did not prove that the firm had existed in Assessment Year-2010-11. Courts have held that there is no concept of res judicata in income tax proceedings and each year has to be taken as separate. As stated in earlier grounds the appellant expressed its inability to produce any evidence in support of its claim. Accordingly, the claim of the appellant is rejected. Ground of appeal is **dismissed**.*

8.6. *While on the subject it is also relevant to note that the Ld. Assessing Officer has treated the appellant as a Firm in the ITNS-65. Since the Ld. Assessing Officer himself has held that the appellant could not prove itself to be a firm, the appellant is to be taxed as an individual”.*

13. Since the assessee failed to submit the copy of the partnership deed and other details before the ld. Assessing Officer, it was very difficult to decide whether genuine partnership was existing or not. The ld. 1st Appellate Authority has directed that the assessee be reassessed in the capacity of individual because there was no account of the partnership firm where contract receipts were received as per the finding of the ld. CIT(Appeals). After going through the finding of the ld. CIT(Appeals), we do not find any error. Hence this ground of appeal is rejected.

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

Order pronounced in the open Court on August 3rd, 2022.

**Sd/-
(Manish Borad)
Accountant Member**

**Sd/-
(Rajpal Yadav)
Vice-President (KZ)**

Kolkata, the 3rd day of August, 2022

- Copies to :*
- (1) M/s. P.K. Upadhyay,
Thana Toli, Chandwa,
Latehar, Jharkhand-829203*
 - (2) Income Tax Officer,
Ward-3(5),
Bye Pass Road, Daltonganj, Palamau,
Jharkhand-822101*
 - (3) Commissioner of Income Tax (Appeals), Ranchi,*
 - (4) Commissioner of Income Tax-*
 - (5) The Departmental Representative*
 - (6) Guard File*

TRUE COPY

By order

*Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata*

Laha/Sr. P.S.