

आयकर अपीलीय अधिकरण, कोलकाता
आभासी सुनवाई माध्यम से
IN THE INCOME TAX APPELLATE TRIBUNAL
PATNA BENCH
THROUGH VIRTUAL HEARING AT KOLKATA

समक्ष : श्री मनीष बोरड, लेखा सदस्य एवं
श्री संजय शर्मा न्यायिक सदस्य

Before: SHRI MANISH BORAD, ACCOUNTANT MEMBER and
SHRI SONJOY SARMA, JUDICIAL MEMBER

आयकर अपील सं.य/
ITA Nos. 314-316/PAT/2018
निर्धारण वर्ष:
Assessment Year:2009-10

Arun Construction Naya Chak, Ishak Chak Mahabir Prasad Lane, Bhagalpur- 8120001, Bihar.	<u>बनाम /</u> V/s.	ACIT, Circle-1, Bhagalpur
PAN: AAFFA9557K		
अपीलार्थी /Appellant	..	प्रत्यर्थी /Respondent
अपीलार्थी की ओर से/By Appellant	Shri K.N. Prasad, Advocate, Ld.AR	
प्रत्यर्थी की ओर से/By Respondent	Shri Rupesh Agarwal, Ld.SR-DR	
सुनवाई की तारीख/Date of Hearing	28-06-2022	
घोषणा की तारीख/ Date of Pronouncement	12-08-2022	

आदेश / O R D E R

PER MANISH BORAD, AM.

These three appeals have been preferred by the assessee against the separate orders dated 08-12-2016, 15-01-2016, 11-12-2015 of the Ld. Commissioner of Income-tax, Appeals [hereinafter referred to as

‘CIT(A)’, Bhagalpur passed u/s. 250(6) of the Income-tax Act, 1961 hereinafter referred to as ‘the Act’ for the AY 2009-10.

2. Since the issue(s) raised in these appeals are common and relate to same assessee, these are being heard together and being disposed off by this common order for the sake of convenience and brevity.

3. The assessee has raised the following grounds of appeal along with additional grounds of appeal:-

ITA No. 314/Pat/18 AY 2009-10

1. For that the grounds of appeal hereto are without prejudice to each other.

2. For that in the facts and circumstances of the case the learned CIT(A) has erred in dismissing the grounds raised before him that the Assessing Officer is not justified in adding a sum of Rs. 5,37,445/- separately. The learned CIT(A) has not considered the case of the appellant in proper perspective. Bonafide and legitimate submission made has not been adhered to. There is no justification of any addition much less separate addition of Rs. 5,37,445/-. The addition of Rs. 5,37,445/- a sustained is arbitrary, unjustified, void ab-initio and bad in law. The addition as sustained is fit to be deleted/modified.

3. For that the appellant reserves its right to file detailed submission at the time of hearing.

4. For that the appellant craves leave to urge, add or alter any other ground or grounds at the time of hearing.

Additional Grounds of appeal

ITA No. 314/Pat/18 AY 2009-10

1. For that the additional grounds of appeal hereto are without prejudice to each other.

2.1 For that in the facts and circumstances of the case, the learned CIT(A) has failed to adjudicate the following ground:-

For that in the facts and circumstances of the case, the Assessing Officer is not justified in resorting the provisions of section 147 / 148 of the I.T Act, 1961. The condition precedent for invoking the provisions of sections 147 is not applicable.

No proceeding u/s 747 could be invoked 1 initiated for making fishing and roving enquiries. Further, no proceeding under 147 could be invoked / initiated for making the impugned addition of Rs. 5,37,4451- being income from other sources. The resorting of the provisions of section 147 / 148 is arbitrary, unjustified, void ab-initio and bad in law. In any case, the assessment as completed u/s 143(3) rws 147 of the I T. Act, 1961 is fit to be annulled 1 cancelled.

2.2 For that this is a case of change of opinion. Initiation of proceeding u/s 147 and resorting the provision of section 147 I 148 is arbitrary unjustified, void ab-initio and bad in law.

3. For that the learned CIT(A) has also failed to adjudicate the following grounds:-

(i) For that in the facts and circumstances of the case, there is no justification for addition of a sum of Rs. 9,43,7351- being hire charges separately. The case of the assessee has not been considered in proper perspective. The addition of Rs. 9,43,735/- as separately made is arbitrary, unjustified, void ab-initio and bad in law. In any case, the addition as made is fit to be deleted.

(ii) For that in the facts and circumstances of the case, the application of net profit rate @ 8% is arbitrary and unjust. The provisions of section 145(3) is not applicable. The income estimated in the manner provided u/s 144 of the I. T Act, 1961 @ 8% is arbitrary and unjust. The addition as made is fit to be deleted.

(iii) For that in the facts and circumstances of the case, the disallowances of bonafide and legitimate deduction available to the assessee u/s 40(b) of the I TAct, 1961 is arbitrary and unjust being interest and salary to partners. The statutory deduction provided under the statute uls 40(b) is fit to be allowed. The disallowance as made is arbitrary and unjust. In any case, the disallowances as made are fit to be deleted.

(iv) For that in the facts and circumstances of the case, the learned Assessing Officer is not justified in charging interest u/s 234A at Rs. 69,5861-, 234B at Rs. 29,94~/-, 234D at Rs. 3,02,3631- and 244A at Rs. 1,84,080/-. The charging of interest u/s 234A, 234B, 234D and 244A is arbitrary and unjustified. The interest component as included in the demand notice is fit to be deleted.

4. For that the appellant reserves its right to file detailed submission at the time of hearing.

5. For that the appellant craves leave to urge, add or alter any other ground or grounds at the time of hearing.

ITA No. 315/Pat/18 AY 2009-10

1. For that the grounds of appeal hereto are without prejudice to each other.

2.1 For that in the facts and circumstances of the case, the learned CIT(A) has erred in confirming the addition of Rs. 9,43,735/-, separately as added by Assessing Officer on account of hire charges. The learned CIT(A) confirmed the addition as made by the Assessing Officer on the footing that no such addition has been made by the Assessing Officer. It is submitted that the Assessing Officer very much made the addition of Rs.9,43,735/- to arrive at total taxable income at Rs. 66,98,973/- or Rs. 66,98,970/-. The learned CITA has not decided this ground in proper perspective.

2.2 For that the assessee has received a sum of Rs. 9,43,735/- as hire charges. In order to earn the hire charges, assessee has to provide maintenance to JCB Machine, including salary to driver, salary to helper, fuel charges, repairs and maintenance, depreciation and other charges. The total hire charges is not taxable. The addition of Rs. 9,43,735/- on account of hire charges as sustained 1 confirmed by the learned CIT(A) is arbitrary, unjustified, void ab-initio and bad in law. The addition as sustained is fit to be deleted.

3. For that in the facts and circumstances of the case, the learned CIT(A) is not justified in confirming the disallowances of Rs. 13,33,805/- as disallowed by the Assessing Officer on account of salary and interest payable to partner. The disallowance of Rs. 13,33,8051- as sustained by the Assessing Officer on account of salary and interest payable to the partner is arbitrary, unjustified, void ab-initio and bad in law. The addition as sustained is fit to be deleted.

4. For that the appellant reserves its right to file detailed submission at the time of hearing.

5. For that the appellant craves leave to urge, add or alter any other ground or grounds at the time of hearing.

ITA No. 316/Pat/1018 AY 2009-10

1. For that grounds of appeal hereto are without prejudice to each other.
2. For that in the facts and circumstances of the case, the learned CIT(A) is not justified in sustaining the income from hire charges @ 60% of the gross receipt. Sustaining the income @ 60% of the gross receipt (hire charges) of Rs. 9,43,735/- is arbitrary, unjustified and void ab-initio. The addition as sustained is fit to be modified / deleted.
3. For that the appellant reserves its right to file detailed submission at the time of hearing.
4. For that the appellant craves leave to urge, add or alter any other ground or grounds at the time of hearing.

4. Brief facts of the case as culled out from records and as narrated by the Ld. Counsel for the assessee are that the assessee is a partnership firm engaged in construction business. Income of Rs. 2,91,042/- declared in e-return filed on 01-10-2009 u/s. 139(1) of the Act. The assessee declared 0.39% net profit on gross contract receipts of Rs.7,14,03,035/-. The case was selected for scrutiny through CASS with the reason *“to examine various aspects of contractors (excluding transporters) business and the genuineness of Sundry Creditors”*. Notice u/s. 143(2) and 142(1) of the Act were duly issued and served upon the assessee during the course of assessment proceedings. Various details as mentioned in para 2 of the assessment order dt.31.10.2011 were called for and assessee filed only Tax Audit Report (TAR) including financial statements(part of tax audit report), but books of account were not produced. As the assessee failed to produce books of account & other details except Tax Audit Report and audited financial statements u/s. 44AB of the Act, the Id. AO proceeded to reject the books of account u/s. 145(3) of the Act and framed the best judgment assessment as provided u/s. 144 of the Act and applied net profit rate of 8% on gross contractual receipts at Rs..7,14,03,035/- and computed the net profit at

Rs.57,12,242/- and allowed the claim of salary paid to partners of Rs.96,000/- and interest paid to partners of Rs.12,37,805/- and assessed income at Rs.43,78,437/- u/s. 143(3) of the Act dated 31-10-2011.

5. As far as this action of the Id.AO estimating the net profit of the assessee and assessing the income of assessee at Rs. Rs.43,78,437/-, and the same is not in dispute before us. Subsequent to completion of assessment u/s. 143(3) of the Act the Id. AO framed/passed the assessment order on 11.12.2015 u/s. 154 r.w.s 143(3) of the Act stating that hire charges shown in the P & L account at Rs.9,43,735/- is not in the nature of works contract receipt and, therefore, the same should be added separately to the total income of the assessee. In the very same order passed u/s. 154 of the Act dt.11.12.2015 the Id. AO has made the addition for interest on NSC/FD at Rs.5,47,445/- under the head 'Income from 'other sources' ', which were not added while computing the income in the assessment order u/s. 143(3) of the Act dated 31.10.2011. Thereafter, again another order u/s. 154 r.w.s 143(3) of the Act was framed on 15.01.2016, wherein the Id. AO did not allow the claim of remuneration & interest paid to partners stating that since the assessee did not file requisite details during the assessment proceedings the Id. AO framed/passed best judgment assessment as per provisions of section 144 of the Act and therefore, the assessee firm is not eligible to claim any deduction towards remuneration and interest paid to partners as provided u/s. 184 of the Act. But this time when the computation of income was prepared by the Id.AO, he added the amount of Interest/FD to the contractual receipts at Rs.7,14,03,035/- and estimated the net profit at 8% on the gross contract receipts of

Rs.7,19,40,480/-, thereby calculating/estimating the income at Rs.57,55,238/- by further adding hire charges at Rs.9,43,735/- and assessed income at Rs.66,98,973/-. Subsequent to the order passed u/s. 143(3) of the Act dt. 30-10-2011, order(s) passed u/s. 154/143(3) of the Act dt. 11.12.2015 and 15-01-2016 assessee's case was further re-opened u/s.147 of the Act by issuing notice u/s. 148 dt. 28.3.2016 and re-assessment proceeding was carried out and income re-computed after considering income from NSC/FDR at Rs. 5,37,445/- and Hire charges at Rs. 9,43,735/- separately and adding them to the income estimated at Rs. 57,12,343/- @ 8% of the gross contract receipts, thereby reassessing income at Rs.71,93,423/- and not allowing claim of remuneration and interest to partners.

6. We further observe that aggrieved with u/s. 154 order(s) of the Act dt. 11.12.2015 and 15-01-2016 and re-assessment order passed u/s. 147 of the Act dt. 08.12.2106 the assessee preferred appeal(s) before the Id. CIT(A), but, except for getting relief for hire charges income being estimated @ 60% at Rs.9,43,735/- the assessee failed to get any relief on the remaining additions made by the Id. AO referred hereinabove.

7. As far as appeal number in ITA Nos. 315 & 316/Pat/18 the additions/adjustments made by the Id. AO u/s. 154 of the Act has not been deleted by the Id.CIT(A) and are in dispute before us. We find that when the case of the assessee was assessed u/s. 143(3) of the Act on 31-10-2011 as against the net profit rate @ 0.39% declared by the assessee on the gross contract receipts of Rs.7,14,03,035/-, the Id. AO after examining the financial statements and tax audit report and in absence of books of account, bills and vouchers not produced by the

assessee before him, passed best judgment assessment as provided u/s. 144 of the Act and estimated the net profit rate @ 8% of the gross receipts. We find that the adjustments made in the order passed u/s. 154 of the Act dt. 11.12.2015 and 16/1/2016 are not apparent mistakes on records, because the Id.AO has passed best judgment assessment order based on financial statements placed before him and therefore, the adjustments made by the Id. AO in the order passed u/s. 154 of the Act treating the hire charges as part of the contract receipts and again adding them to the total income and also adding the amount of interest on NSC/FD as part of the gross contract receipts and not allowing the claim of partner's remuneration and interest, which have been allowed in the regular assessment proceedings by no stretch of imagination are mistakes apparent from records. Therefore, in our considered view all the adjustments made in the order(s) u/s. 154 of the Act dt. 11.12.2015 and 15.1.2016 have no legs to stand and therefore, the alleged addition in challenge before us arising out of the said order stands deleted. Accordingly, all the effective grounds raised in appeal nos. ITA Nos.315 & 316/Pat/2018 for the AY 2009-10 are allowed.

8. As far as appeal No. ITA No.314/Pat/18 for the AY 2009-10 is concerned, we find that assessee apart from raising grounds on merits about the separate additions made on interest on NSC/FDR at Rs.5,47,445/- has also raised additional ground challenging the legality of the re-assessment proceedings u/s. 147 r.w.s 143(3) of the Act. The additional ground being legal ground can be raised at any stage. Even this legal ground was raised before the Id. CIT(A), but the same was not adjudicated. Hon'ble Apex Court in the case of NTPC (National Thermal Power Company Ltd Vs. CIT reported in (1998) 229 ITR 383 (SC) held

that *Tribunal has jurisdiction to examine a question of law, which arises from the facts as found by the lower authorities below and having a bearing on the tax liability of the assessee.* We, therefore, admit the additional ground and decided to dispose of the same on merits.

9. After perusing the records, we find that case of the assessee in AY 2009-10 the assessee's case was re-opened by issuing notice u/s. 148 of the Act on 28.3.2016, which is beyond four years. Reason for which the case of the assessee has been re-opened relates to taxing the interest income of Rs.5,37,445/- as income from 'other sources' and not treating it as part of gross contract receipts. We find that the reason for which the case has been reopened relates to interest income of Rs.5,37,445/-. This interest income has been duly shown in the audited financial statement and tax audit report and it is not a case that the assessee failed to disclose such income in the I.T return. The Id. AO has not received any information from outside source, which the assessee failed to furnish/disclose in the return of income or concealed any particulars. Thus, it is a clear case of change of opinion as the Id. AO passed best judgment assessment order after going through the financial statements and details appearing in the audit report and the audited balance sheet, which included the interest income on FDR/NSC and took a plausible view and estimated the net profit @ 8% of the gross contract receipts as against 0.39% declared by assessee. This action of Id.AO is sufficient to indicate that Id.AO has considered all aspects and took a best judgment to assess the assessee's income at much higher than the income declared in Audited Financial Statements.

10. We find that on the very same issue of taxability of interest income on FDR/NSC the Id.AO wants to change his opinion and also wants to tax it separately as income from 'other sources'. It is judicially well settled that for mere change of opinion, reopening of assessment is not allowed. We, therefore, are of the considered view the re-opening proceedings carried out by the Id.AO are *bad in law* and liable to be *quashed*. Accordingly, we quash the re-opening proceedings carried out in the order dt. 08.12.2016 and delete the addition(s) so made in this assessment. Thus, legal issue raised in additional ground by the assessee in appeal no.(ITA No.314/Pat/18 for the AY 2009-10) is allowed. The other grounds raised in this appeal on merits are merely academic in nature, which requires no adjudication. This appeal (ITA No. 314/Pat/2018 for the AY 2009-10) of the assessee is allowed.

परिणामतः निर्धारिती की अपील सं. 314,315 एवं 316/Pat/18 मंजूर की जाती है।

11. In the result, all the appeals (ITA Nos. 314,315 and 316/Pat/18) of the assessee are allowed.

आदेश खुले न्यायपीठ में दिनांक -08- 2022 को उद्घोषित।

Order pronounced in open court on 12 -08-2022

Sd/-

Sd/-

(SONJOY SARMA)
JUDICIAL MEMBER

(MANISH BORAD)
ACCOUNTANT MEMBER

Kolkata/ कोलकाता

**PP/Sr.PS

दिनांक:- 12 /08/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी/Appellant- Arun Construction, Naya Chak, Ishak Chak Mahabir Prasad Lane,Bhagalpur-8120001, Bihar.
2. प्रत्यर्थी/Respondent-ACIT, Circle-1, Bhagalpur
3. संबंधित आयकर आयुक्त / Concerned CIT
4. आयकर आयुक्त- अपील / CIT (A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण कोलकाता / DR, ITAT, Patna
6. गार्ड फाइल / Guard file.

/True Copy/

By order/आदेश से,

सहायक पंजीकार
आयकर अपीलीय अधिकरण,कोलकाता ।

3. Brief facts of the case are that the assessee is a partnership firm and engaged in the business as a contractor. Income of Rs. 91,78,650/- was declared in e-return filed on 27-09-2015. The case was selected for limited scrutiny for examination of sundry creditors, transaction with persons in