IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI GEORGE MATHAN, JUDICIAL MEMBER
AND ARUN KHODPIA, ACCOUNTANT MEMBER

ITA No.114/CTK/2020
Assessment Year : 2015-16

M/s. Fayaj Infratech Pvt Ltd., C-56, Baramunda Housing Board Colony, Bhubaneswar.	Vs.	DCIT, Circle 1(1), Aayakar Bhavan, Bhubaneswar.
PAN/GIR No.AABCF 6797 R		
(Appellant)	..	(**Respondent**)

Assessee by : Shri K.K.Bal, AR
Revenue by : Shri S.C.Mohanty, Sr. DR

Date of Hearing : 11 /01/2023
Date of Pronouncement : 11/01/2023

O R D E R

Per Bench

This is an appeal filed by the assessee against the order of the ld CIT(A)-1, Bhubaneswar, dated 11.12.2019 in Appeal No. 0509/17-18 for the assessment year 2015-16.

2. Shri K.K.Bal, ld AR appeared for the assessee and Shri S.C.Mohanty, ld Sr DR appeared for the revenue.

3. It was submitted by ld AR that four issues are involved in assessee's appeal. The first being against the disallowance of adhoc payment of Rs.8000/- to each of the labourers working under the assessee which was

claimed as bonus but not actually the statutory bonus under the provisions of section 43B of the Act, the second is in respect of non-allowance of higher rate of depreciation in respect of heavy earth moving machinery used by the assessee in its business on construction of roads, the third issue being the disallowance at 100% as against 30% of the amount disallowed by applying the provisions of section 40(a)(ia) of the Act and the fourth being the issue against the non-granting of benefit of credit of TDS.

4. At the time of hearing, ld AR submitted that he did not wish to press Ground No.6 of the appeal, which was in relation to non-granting of the benefit of credit of TDS. He has also endorsed the appeal memo to that effect. Consequently, Ground No.6 of the appeal stands dismissed as not pressed.

5. Ground Nos.1 & 7 are general in nature and hence no separate adjudication is required.

6. In respect of the disallowance of the alleged bonus paid by applying the provisions of section 43B of the Act, it was submitted by ld AR that the assessee has made labour payments of nearly Rs.22 943,283.00, which was shown at page 67 of PB under Note 17 to the Profit and Loss account. It was the submission that there were 284 labourers, who worked for the assessee on its various projects of the works contract of construction of roads under Prime Minister Gramina Sadaka Yoyana (PMGSY). These

labourers had been paid adhoc bonus of Rs.8000/- each as they had assisted for timely completion of the contract work. It was the submission that the assessee had claimed the amount of Rs.24,92,300/- representing the said ex-gratia payment to the labourers as bonus in its account. It was the submission that this is not the statutory bonus as the labourers are not permanent employees of the assessee. It was the submission that the salary to the permanent employees of the assessee has been claimed separately at Rs.10,80,000/-. It was the submission that the ex-gratia payment of Rs.8000/- each to the labourers being non-statutory bonus, the provisions of section 43B of the Act did not apply. It was the submission that the disallowance as made by the AO and confirmed by the ld CIT(A) is liable to be deleted.

7. In reply, ld Sr DR submitted that there is no evidence of the assessee having paid the amount to the labourers though the assessee claims that the amount has been paid in subsequent year. It was the submission that the issue must be restored to the file of the AO to examine whether the amount of Rs.8000/- to each labourer has been paid or not. He vehemently supported the order of the AO and ld CIT(A).

8. We have considered the rival submissions. A perusal of the profit and loss account of the assessee and Note-17 thereto showing employee benefit expenses shows that there is labour payment to the extent of Rs.2.29 crores, staff salary of Rs.10.80 lakhs and bonus has been shown at

Rs.24.92 lakhs. Admittedly, no statutory bonus is applicable to the labourers. These payments of bonus @ Rs.8000/- per labour for 284 labourers, admittedly would not be statutory bonus but ex-gratia payment. As it is not statutory bonus, the provisions of section 43B also would not apply. The issue by the AO is whether the bonus is liable to be allowed or disallowed u/s.43B. The issue is not in respect of payment of the bonus to the said labourers. This being so, we are of the view that the issue cannot be restored to the file of the AO for verification of the payment. As the payment is not statutory payment of bonus under Bonus Act, obviously, the provisions of section 43B would not apply to the same. Consequently, the disallowance as made by the AO and confirmed by the ld CIT(A) by applying the provisions of section 43B on the bonus paid stands deleted. Ground No.3 of the assessee stands allowed.

9. In regard to issue of higher rate of depreciation, it was submitted by ld AR that for the purpose of obtaining contract under PMGSY, it was compulsory that the assessee owns Heavy Earth Moving machineries. It was the submission that when the said Heavy Earth Moving machinery is used in the contract, the machinery is in fact actually hired to the contractee. It was thus the submission that as the heavy earth moving machinery has been hired to the contractee, the assessee is entitled to higher rate of depreciation in respect of WDV of the said heavy earth moving machinery.

10. In reply, ld Sr DR submitted that the contract entered into by the assessee is a consolidated contract. The heavy earth moving machineries are used by the assessee for the timely completion of the contract and for meeting the criterion in respect of the quality in the contract. The heavy earth moving machineries are not hired out to the contractee and the assessee has also not shown hire charges in its profit and loss account. It was the submission that the higher rate of depreciation cannot be granted to the assesse.

11. We have considered the rival submissions. A perusal of the profit and loss account clearly shows that as specifically mentioned by ld DR that the assessee has not shown any hire charges in respect of heavy earth moving machineries used by the assessee in its business of the contract of road building. The higher rate of depreciation admittedly is permissible when heavy earth moving machinery is put on hire in the business of the assessee. The assessee has not hired heavy earth moving machinery in the business of the assessee. This being so, we are of the view that the assessee is not entitled to the higher rate of depreciation in respect of said plant and machinery. Ground No.4 is held against the assessee and addition made by the AO and confirmed by ld CIT(A) stands confirmed. Ground No.4 stands dismissed.

12. In regard to issue of disallowance called for under the application of the provisions of section 40(a)(ia) of the Act, it is noticed that the

Explanation to the provisions of section 40(a)(ia) of the Act has been introduced w.e.f. 1.6.2015, wherein, the disallowance has been reduced from 100% to 30%. It was the submission that the Assessing officer has disallowed payment on which the TDS has not been made, at 100%. It was the prayer that the disallowance may be restricted to 30%.

13. Ld Sr DR vehemently supported the order of the AO and ld CIT(A).

14. We have considered the rival submissions. A perusal of the Explanation to Section 40(a)(ia) of the Act clearly shows that the disallowance on account of non-deduction of tax is restricted to 30%. Consequently, the Assessing officer is directed to restrict the disallowance to 30% as against 100% made by the AO. Ground No.5 stands partly allowed.

15. In the result, appeal of the assessee stands partly allowed.

Order dictated and pronounced in the open court on 11/1/2023.

Sd/-	sd/-
(Arun Khodpia)	**(George Mathan)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 11/01/2023
B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : M/s. Fayaj Infratech Pvt Ltd., C-56, Baramunda Housing Board Colony, Bhubaneswar

2. The Respondent: DCIT, Circle 1(1), Aayakar Bhavan, Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar.
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack