

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR**

**BEFORE: DR. S. SEETHALAKSHMI, JM
&
SHRI RATHOD KAMLESH JAYANTBHAI, AM**

**ITA Nos. 95/Jodh/2012
(ASSESSMENT YEAR- 2008-09)**

M/s Mohta Construction Co. 25-B, Sadul Ganj, Bikaner.	Vs	Asstt. Commissioner of Income Tax, Circle-2, Bikaner.
(Appellant)		(Respondent)
PAN NO. AADFM 1414 B		

(Virtual hearing)

Assessee By	Shri Shkati Modh
Revenue By	Shri S.M. Joshi, JCIT-DR
Date of hearing	06/07/2023
Date of Pronouncement	10/07/2023

ORDER

PER: Dr. S. Seethalakshmi, JM

This matter was earlier dismissed ex-parte by the Coordinate Bench vide its order dated 08.10.2012 for non-prosecution and thereafter, the Coordinate Bench vide its order dated 09.10.2014 has recalled the earlier ex-parte order and accordingly the matter has now come up for hearing before us.

2. The assessee has raised the following grounds of appeal:-

“1. That the assessment completed by the Assessing Officer is against the law and the order of learned CIT(Appeals) sustaining the disallowances/not allowing the deductions claimed by the appellant is bad at law.

2. That the Ld. A.O. has seriously erred in applying the provisions of section 145 of the income tax and Ld. CIT(A) is also erred in sustaining the action of Assessing officer, as such the application of section 145 is against the law because the appellant has maintained regular books of account and the same were duly audited as per provisions of the Income Tax Act.

3. That the Ld. A.O. is not justified in rejecting the books of the account where the appellant has maintained regular books and head wise expenditure as well.

4. That the Ld. A.O. as well as Ld. CIT(A) were not justified in application of rate of profit @ 7%, which is not in accordance with the past history of the appellant's own case. The Ld. CIT(A) has erred in sustaining the rate of profit @7%, where in the immediately preceding year he himself directed the AO to apply a profit rate of 6% on the contract receipts..

5. That the Ld. Assessing officer as well as CIT(A) is not justified in not allowing the deduction of interest paid to third parties after application of rate of profit under section 145. It is allowable deduction even after application of profit rate as per the various judicial pronouncements of the Hon'ble jurisdictional High Court as well as other High Courts.

6. That the Ld. A.O. is not justified in charging the interest.

7. That the appellant reserves the right to add, alter or delete any ground or grounds of the appeal during the course of hearing.”

3. Brief facts of the case are that the assessee is a partnership firm executing works contracts for MES Department. The assessee firm

filed its return of income on 20.09.2008 declaring total income of Rs. 11,44,720/- which was processed u/s 143(1) on 20.04.2009. During the year under consideration on gross receipts adjusted by opening and closing work in progress amounting to Rs. 8,60,45,404/- the assessee declared profit rate of 5.68% against this the ld. AO has applied a profit rate of 7% which is excessive. Further, the ld. AO did not allow deduction on account of Depreciation on fixed assets and interest paid to third parties.

4. Being aggrieved by the AO the assessee preferred an appeal before the ld. CIT(A) and the findings are reproduced as under:-

“ I have considered the facts of the case and the submissions made. Non maintenance of details of work in progress as also the daily records of consumption of raw material and the improper maintenance of vouchers in respect of various expenses were sufficient defects noticed by the AO to warrant the rejection of books of accounts. On similar basis, the books of accounts were rejected u/s 145 in the past.

In view of this, the rejection of books of accounts by the AO is held to be justified. This part of ground of appeal, therefore, fails. As regards estimation of profit rate it is seen that during the year under consideration the appellant's turnover had increased from Rs.6.58 crores in the immediately preceding year to Rs.8.60 crores in the current year. The appellant having shown profit rate of 5.68 % as against 5,3 % is rather misleading because the opening and closing work in progress has been valued only on an estimate basis. The valuation of work in progress appears to be adjusted/manipulated only to show the required rate of profit. The plea of the A/R that prices had gone up was not substantiated by specific details as was done in the preceding year. Further, the acceptance of rate of profit at 5% by various Tribunals would be in the given set of facts in the respective cases. How the same were applicable to the appellant's case could not be explained by the A/R. In view of the

foregoing, it is held that the AO was justified in adopting the rate of 7 %. The same is, therefore, sustained.”

5. As the assessee not received any favour from the appeal filed before Id. Ld. CIT(A). The present appeal filed against the said order of the Id. CIT(A) dated 20.12.2011 before this tribunal on the grounds as reiterated in para 2 above. To support the grounds so raised the Id. AR appearing on behalf of the assessee has placed their written submission which is extracted in below:-

“May it please your Honour,

The about noted appeal is fixed for hearing on 27/07/2022 and it is requested that the appeal may kindly be decided on the basis of written submissions which are as follows-

1. That the appeal is a partnership firm executing works contract for MES and during the year the appellant declared a profit rate of 5.68% on contract receipts amounting to Rs. 8,60,45,404/- subject to deduction on account of depreciation, interest paid to third parties and interest paid to partners. However, the AO applied profit rate of 7% and only allowed deduction on account of interest paid to the partners.

2. Against the above order, the appellant filed appeal before the learned CIT(Appeals) disputing rate of profit 7% against 5.68% and against not allowing deduction on account of Depreciation and interest paid to third parties. The learned CIT(Appeals) maintained the profit rate of 7%. However, deduction on account of Depreciation was allowed but deduction on account of interest paid to third parties not allowed and thus the only point disputed in this appeal is regarding deduction of Rs.19,78,944/- on account of interest paid to third parties.

3. The learned CIT(Appeals) not allowed deduction on account of interest to third parties for the reason that in the appellant's own case for Asstt. Year 2004-05, while deciding the appeal filed by the department held that deduction on account of interest paid to third party not allowable and on this issue appeal of the appeal was pending before the Rajasthan High Court.

4. The Rajasthan High Court in DB Income Tax Appeal No. 59/2009 order dated 23/01/2018 remitted back the matter holding that the reversal of finding of CIT(Appeals) was not correct. The copy of judgment of the Rajasthan High Court is being enclosed marked as Anx.1.

5. That after the matter was remanded by the Rajasthan High Court, vide order dated 12/09/2019 this tribunal disposed off as many as 51 appeals and appeals filed by the revenue were dismissed on the ground of Monetary Limit being less than 50 lacs. Copy of

order is being enclosed marked as Anx.2. The case of the appellant (ITA 127/Jodh/2008 for 2014- 15) can be found at page 10 of the order.

6. In view of the above facts, the order passed by the ITAT in respect of Asstt. Year 2004-05 does not survive as such not applicable for not allowing deduction on account of interest paid to third parties.

7. It is worth while to point out that the appeal for this year as well as for other assessment years were pending before this tribunal but the appeal for this year was earlier dismissed for non presence of appellant and thereafter vide order dated 09/10/2014 it was restored and now it is fixed for hearing. Meanwhile, the appeals for Asstt. Year 2007-08 and 2010-11 in the case of appellant's own cases have been decided directing to allow the deduction on account of interest paid to third party. Copy of order of the ITAT dated 8/3/2016 marked as Anx. 3 is being enclosed. It was a common order in respect of Asstt. Year 2007-08 and 2010-11 and for both the years the issue regarding interest paid to third parties have been decided in favour of the appellant. Thus, the present case is squarely covered by the earlier decision of the ITAT in its own case.

In view of the above facts and legal position, the appeal filed by the appellant be decided and the AO be directed to allow deduction of account of interest paid to third parties.”

6. Per contra, the ld. DR relied upon the orders of the ld. AO and he did not object to the facts that in earlier year the ITAT decided the case in favour of the assessee.

7. We have heard the both parties and perused the materials available on record. Before us the Ld AR for the assessee did not press for the Ground of Appeal Nos. 1 to 4. Thus, the effective Ground No. 5 is to be decided and on that own case thus, it is find that the issue is decided in favour of the assessee is squarely covered in ITA No. 356/Jodh/2010 wherein it is held as under:-

“5. We have considered the rival submissions. Admittedly, the learned CIT (A) has upheld the rejection of assessee’s books of account. The assessee has not been able to rebut the findings given by the learned CIT (A) in respect of rejection of assessee’s books of account. This being so, we are of the view that the findings in

respect of rejection of books of account given by the Assessing Officer and confirmed by the learned CIT (A) are in right footing and does not require our interference.

6. Coming to the issue of net profit rate declared by the assessee at 5.30% and estimated at 7% by the Assessing Officer and reduced to 6% by the learned CIT (A) it is noticed that the learned CIT (A) has taken into consideration actual variation in the prices of cement, steel and the rate increase in VAT. This being so, we are of the view that reduction of net profit rate by the learned CIT (A) to 6% is substantiated and no interference to the findings is called for. Consequently the appeal of the Revenue stands dismissed and grounds No.2 and 3 of the assessee's appeal also stand dismissed, in so far as the assessee has not pressed the ground challenging the action of the learned CIT (A) in directing the Assessing Officer to estimate net profit rate at 6%.

7. Coming to the issue of interest paid to third parties which has been claimed as deduction by the assessee and has been disallowed by the Assessing Officer, it is noticed that what has been estimated is not the gross profit but net profit. When computing the net profit, the expenditure incurred by the assessee in respect of earning of income under the head "business" is rightly to be allowed. Here, the books of account of the assessee has been rejected, the interest paid to third parties falls under the head "business expenditure" which is liable to be deducted while computing the net profit. In the present case, as the net profit itself has been estimated no further addition to the same by picking and choosing items from expenditure account can be made. Consequently, we are of the view that the interest paid to third parties are liable to be allowed and further addition made by the Assessing Officer on account of the interest paid to third parties stands deleted.

8. In respect to the issue of interest received from the bank on FDs, it is noticed that the interest income of the assessee from fixed deposit is not "business income" of the assessee. It is liable to be assessed under the head "income from other sources". The business of the assessee is not making any Fixed Deposit and deriving interest there from. Further, the assessee has also not been able to show as to how the bank interest was in any way intrinsically connected to the business activity of the assessee for the purpose of claiming that the interest received on the FDRs are business income. In the circumstances, the findings of the learned CIT (A) in confirming the addition Rs.70,709/- on account of bank interest especially under the head "income from other sources" stands confirmed. Consequently, the Revenue's appeal in ITA No.356/Jodh/2010 stands dismissed and the assessee's appeal in ITA No.361/Jodh/2010 stands partly allowed."

In our view, since the matter is covered by judgment of the Division Bench of this Court in the assessee own case , we are of the opinion, the same being squarely applicable on the issue raised in the instant appeal.

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

Order pronounced in the open court on 10/07/2023.

Sd/-

(RATHOD KAMLESH JAYANTBHAI)
ACCOUNTANT MEMBER

Sd/-

(DR. S. SEETHALAKSHMI)
JUDICIAL MEMBER

Dated : 10/07/2023

**Santosh*

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR
6. Guard File

Assistant Registrar
Jodhpur Bench