

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A": NEW DELHI
BEFORE SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER**

ITA Nos. 1678/Del/2017 & 1623/Del/2020
(Assessment Years: 2011-12 & 2018-19)
Bihari Lal Menghani, Vs. DCIT,
WZ-13, 2nd Floor, Bindra CPC, New Delhi
Market, New Delhi
(Appellant) (Respondent)
PAN: AAFFB5151N

Assessee by : Sh. Salil Kapoor, Adv
Revenue by: Shri Kanv Bali, Sr. DR

Date of Hearing 17/10/2023
Date of pronouncement 20/10/2023

O R D E R

PER M. BALAGANESH, A. M.:

1. The appeal in ITA Nos.1678/Del/2017 for AY 2011-12 and 1623/Del/2020 for AY 2018-19, arises out of the order of the Commissioner of Income Tax (Appeals)-12, New Delhi, [hereinafter referred to as 'Id. CIT(A)', in short] in Appeal Nos.29/14-15 and 72/19-20 624/18-19, dated 29.12.2016 and 31.07.2020 respectively against the order of assessment passed u/s 143(3) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 31.05.2019 by the Assessing Officer, CPC, Bangalore and 28.02.2014 passed by Id JCIT, Range-19, New Delhi (hereinafter referred to as 'Id. AO').

ITA Nos. 1678/Del/2017 (AY: 2011-12)

2. Let us take up the appeal for AY 2011-12 first.

3. At the outset, we find that the assessee has raised additional grounds vide letter dated 14.10.2021, which are reproduced herein under:-

6. "That the assessment order passed dated 28.02.2014 for A.Y. 2011-12 by the Joint Commissioner of Income Tax ("JCIT") is illegal, bad in law and without jurisdiction as the JCIT was not the competent person to pass the said assessment order.

7. That the JCIT who passed the assessment order dated 28.02.2014 for A.Y. 2011-12 was not competent to pass the said order, as such the assessment order is liable to be quashed."

4. But no arguments were advanced by the Id counsel for the assessee with regard to these additional grounds. Hence, we do not deem it fit to even admit the same.

5. The ground No. 1 raised by the assessee is general in nature and does not require any specific adjudication.

6. The ground No. 2 raised by the assessee is challenging the disallowance of expenditure of Rs. 57,91,815/- on account of labour charges incurred by the assessee.

7. We have heard the rival submissions and perused the materials available on record. The assessee firm is engaged in the business of laying tracks, construction of minor bridges etc for railways and other Govt. departments. The assessee firm filed its return of income for AY 2011-12 on 20.09.2011 declaring total income of Rs. 52,44,930/-. The Id AO in para 2 of the assessment order had stated that the assessee had declared net profit at 5.04% on the gross receipts of Rs. 15,91,65,511/- during the year under consideration as against net profit at 5.22% declared in immediately preceding year. During the course of assessment proceedings, the assessee was called upon to furnish complete details of the wages project-wise. The assessee submitted the

ledger account of labour charges and furnished the project-wise details as under:-

Particulars	Closing Balance
Labour Cess	4,40,751.00
LABOUR CHARGE IRCON/Kalindee	1,15,83,630.00
Labour Charges Bikaner	44,80,870.00
LABOUR CHARGES DELHI METRO	33,03,000.00
LABOUR CHARGES KALINDEE	4,24,25,580.00
METRO	
LABOUR CHARGES KOSLI	63,62,760.00
Labour Charges Panipat	45,48,400.00
Grand Total	7,31,44,991.00

8. The Id AO however mentioned in assessment order with regard to item No. 2 in the aforesaid table as labour charges incurred only for IRCON project of Rs. 1,15,83,630/-, whereas, the said labour charges were incurred for both IRCON/ Kalindee project. The Id AO ultimately proceeded to disallow the said labour charges. The modus operandi adopted by the Id AO for arriving at the said disallowance figure could be understood from the following facts that the Id AO while going through the profit and loss account observed that a sum of Rs.4,40,67,729/- had been incurred on account of job work expenses. This expenditure represents payments made to various sub-contractor engaged by the appellant as sub-contractors to carry out the work entrusted to it by IRCON/Kalindee railways. The assessee filed the details with regard to major sub-contractors which have also been extracted in para 4.2 of the assessment order (page no.3 of the assessment order).

S. No.	Name of the party	Address of the party	Amount paid
1	Chander Shekher Paswan	WZ-13, 1 st Floor, Main Road, Tihar Village, New Subhash Nagar, New Delhi	3,46,15,000/-
2	Shambhu Paswan	WZ-13, 1 st Floor, Main Road, Tihar Village, New Subhash Nagar, New Delhi	17,50,000/-
3	Ritesh Kumar Raitani	WZ-1935, 2 nd Floor, Rani Bagh, New Delhi	29,16,500/-
4	Rohit Kumar	WZ-1475, 2 nd Floor, Rani Bagh, New	12,00,000/-

	Delhi	
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9. Thereafter the Ld. AO called the above-mentioned sub-contractors u/s 131 of the Income Tax Act and recorded their respective statements on oath. The extract of the recorded statements of these sub-contractors have been given in para 4.3 at page nos. 4 to 6 of the assessment order. The gist of the recorded statements of all these contractors is that all of them admitted that they had worked for the assessee firm in relation to the sub-contracts given to them by the firm. In response to the question made to each of the sub-contractor that who paid the labour charges in respect of labour employed by them, each of the sub-contractors replied that they engaged their own labour and paid them out of their remuneration/receipts from the assessee firm.

10. The Ld. AO on receipt of the aforesaid information/details, namely, details of labour payments made by the assessee directly, details of payments — sub-contractors-wise and recording statements of sub-contractors as mentioned in para 4.3, called for information u/s 133(6) of the Act from IRCON about the work given by them to the assessee-firm and the payments made by it with regard to the same. The information received by the Ld. AO from IRCON has been extracted at page no.7 of the assessment order which is reproduced hereunder:-

S.No	Name of Work	Payments
1	Installation Testing and commissioning of Ballastless Track including plinth casting with M-35 Grade of concrete inside tunnel (Board or cut & cover for Phase-II Part-2 Corridor of DMRC (Central Secretariat-Green Park-Qutub Minar-Sushant Lok) Between Ch.26537 (including Green Park Station) and Ch.32398 (upto Ramp) in Delhi dated 30.03.2009.	Rs.90,75,316/-

2	Installation Testing and commissioning of Ballastless Track including plinth casting with M-35 Grade of concrete inside tunnel (Board or cut & cover and viaduct for Phase-II, Part-2 Corridor of DMRC for BT-2 contract of DMRC from Dwarka Sector-9 to Sector-21 in Delhi.	Rs. 1,52,52,762/-
3	Installation Testing and commissioning of Ballastless Track including plinth casting with M-35 Grade of concrete inside tunnel (Board or cut & cover for Phase-II Part-2 Corridor of MRC (Central Secretariat-Green Park-Qutub Minar-Sushant Lok) Haryana Portion.	Rs. 16,70,505/-
4	Painting of Rails	Rs.21.92.404/-
	Total Contract Value in terms of release of payment	Rs.2,81,90.987/-

11. After collecting all these information, the Ld. AO asked the assessee to file details as to what projects were assigned to the sub-contractor and whether the work was done completely through sub-contractors. In reply to this query, the assessee filed the details showing the names of the sub-contractors, the details of the project handled by them, and the proportionate extent of services provided by them in relation to the same. In this regard, the assessee furnished the following chart which is reproduced in page nos. 6 & 7 of the assessment order:-

S.No.	Party Name	Nature of Service Provided	Proportion of Service Provided
1	Shambhu Paswan	Boring of Piles at Kosli Site for North Western, Railway	10% by Shambhu Paswan & 90% by M/s Bihari Lai Menghani.
2	Chander Shekher Paswan	Laying of Tracks at AIIMS to Gurgaon for M/s IRCON International Ltd. Laying of Tracks at Airport Line from Dhaula Kuan to Sector-21, Dwarka for M/s Kalindee Rail Nirman (Engineers) Ltd.	100% Works. - 100% Works
3	Rohit Kumar	Concreting of Track Plinth at Hauz Khas,	Upto 2 Km out of 30

		Malviya Nagar, Saket & Kutub Minar for M/s IRCON International Ltd.	Km s.
4	Ritesh Kumar Raitani	Grouting of Loose Bolts & repair of Plinth at Hauz Khas, Malviya Nagar, Saket & Kutub Minar for M/s IRCON International Ltd.	100% Works

12. The Ld. AO has finally concluded that the works mentioned at serial no. 1 & 2 in table (reported at page 7 of the assessment order) has been got executed by the sub-contractors engaged by the assessee-firm, and the work mentioned at serial no.3 & 4 have been executed by the assessee-firm itself i.e. without the aid of sub-contractors.

13. In line with the above thinking, the Ld. AO arrived at a view that the total amounts incurred by the assessee firm on the work of IRCON amounts to Rs.3,87,31,500/-. This view has been expressed by the Ld. AO in para 4.5 of the assessment order (page no.8 thereof). The amount of Rs.3,87,31,500/- pertains to the payments made to sub-contractors as follows (as mentioned in para 4.5):

Mr. Chander Shekhar Paswan	3,46,15,000/-
Mr. Ritesh Kumar Raitani	29,16,500/-
Mr. Rohit Kumar	12,00,000/-
	3,87,31,500/-

14. Actually these are the figures which have been taken from the details filed by the assessee's counsel with regard to the payment made to the above-said sub- contractor (mentioned in para 4.2 page 3 of the assessment order).

15. To this amount of Rs.3,87,31,500/-, being payments made to these three sub- contractors, the Ld. AO added Rs. 1,15,83,630/- being labour charges perceived by her to have been paid exclusively for IRCON work and, thus, the total amount expended on the IRCON work

was estimated by her to be Rs.5,03,15,130/- (Rs.3,87,31,500+ Rs.1,15,83,630). According to her, the receipts from the IRCON are Rs.2,81,90,987/-, as per the information supplied by IRCON, whereas, the amount expended on IRCON work, calculated in the above manner, worked out to Rs.5,03,15,130/- which according to the Id. AO is almost twice the amounts of receipts from IRCON i.e. Rs.2.82 crore.

16.The Ld. AO further, has taken the view that since the receipts in respect of work mentioned at serial no.3 & 4 in the chart providing information about payments by IRCON, amounts to Rs.38,62,909/-, the reasonable expenditure against these receipts should be 30% and, therefore, she has disallowed the balance expenditure claimed by the assessee i.e. Rs.1,04,24,758/- (Rs.1,15,83,630 claimed by the appellant - 30% of Rs.38,62,909 i.c. Rs.11,58,872 allowed by the Id. AO). Thus, in this manner, a dis-allowance of Rs.1,04,24,758/- has been made towards labour charges out of Rs.1,15,83,630/- claimed by the assessee.

17.As could be seen above, the Id AO arrived at the labour charges incurred of Rs. 2,81,90,987/- from IRCON. The assessee submitted that the figure adopted by the Id AO towards labour charges of 5.03 crores incurred in view of the following:-

(i)The payment of Rs.3,46,15,000/- paid to Mr. Chander Shekhar Paswan - sub- contractor does not exclusively relate to IRCON work but the same is the sum total of all payments made to him during the year. These payments were made for projects relating to IRCON and Kalindee. The details filed by the sub- contractor (Mr. Chander Shekhar Paswan) during the course of recording of statement before the Ld. AO, himself shows these two payments distinctly as the copies of bills raised by him along with respective

works contracts were filed. Out of Rs.3.46 crores, Rs.1.66 crores pertains to work done by him in relation to Kalindee(Project). This Rs.3.87 crores paid to three contractors perceived on account of IRCON actually comes to Rs.2.21 crores (Rs.3.87 crores –Rs. 1.66 crores)

(ii) The second fallacy is that the total amount of Rs.1.15,83,630/- has been CON) w perceived to be on account of IRCON. It was explained that Rs.1,15,83,630/- represents payment towards IRCON/Kalindee. Copy of ledger account in respect of this payment of Rs.1.15 crores also shows the expenditure on two projects/sites i.e. IRCON/Kalindee. Even a summary filed along with the copies of ledger accounts also mentioned payment for IRCON/Kalindee work. This aspect has been lost sight of by the Id. work w AO. Actually, the major portion of this, expenditure is for Kalindee work. The assessee also explained as to why the expenditure incurred on two projects were booked under one head though, normally, assessee has been maintaining labour expenses site-wise and the details of labour expenses have been accordingly so made and filed with the Id. AO. The answer to this is that, that the part of the work i.e. laying lines from sector 9 to sector 21 in Dwarka, relating to Delhi Metro Project (DMRC), being included in total work awarded by IRCON to the assessee and part of the work awarded by Kalindee Rail Nirman (Engineers) Limited i.e. from Sector-21 Dwarka to Dhaula Kuan, generally called as Airport Line, were in the progress around the same time. The major component of the labour expenditure were incurred for Kalindee project i.e. laying of lines from Sector-21 to IGI Airport. Since the work was also going on, on part of the track between sector-9 to sector-21 in relation to IRCON work, the labour worked out simultaneously in these

two projects/sites though the contribution towards IRCON line was very low as compared to Kalindee project. It is for this reason a common muster roll was opened and these expenses were booked in the same and accordingly ledger account was so prepared.

18. The Id CIT(A) in principle agreed that labour charges of Rs. 1,15,83,630/- incurred by the assessee for two projects IRCON and Kalindee project by the assessee and accordingly he proceeded to consider 50% of the labour charges as attributable to IRCON project and deleted the disallowance accordingly. The remaining sum of Rs. 57,91,815/- was sustained by the Id CIT(A). Aggrieved, the assessee is in appeal before us.

19. We find that the Id AR placed on record the information that is available in public domain i.e. distance of Dwarka Sector 9 to Dwarka Sector 21 for laying of track is 3 kms and the distance from Dwarka Sector 21 to Dhoola Kuan is 12 kms. Accordingly, the Id. AR apportioned the labour charges of Rs. 1,15,83,630/- in the ratio of 20:80 for IRCON/ Kalindee project respectively. He also stated that the revenue earned from IRCON project is only Rs. 38,62,909/- and if 20% labour charges is apportionment to the said project which worked out to Rs. 23,16,726/-, still the assessee had shown profit only in IRCON project to the tune of Rs. 15.46 lacs and there would be need for making any addition as the assessee had made the bifurcation only in the ratio 20:80 in the return of income. The Id AR also stated that the major revenue has been earned by the assessee only from Kalindee project for obvious reasons as the distance of laying of tracks is more in the said project than the IRCON project. In these circumstances, we find lot of force in the apportionment of labour charges made by the assessee based on the distance of laying of tracks whereas 20% of labour charges is apportioned towards IRCON project which has been

done by the assessee itself. Hence there is no need for making any disallowance of labour charges of Rs. 57,91,815/-. Accordingly, ground No. 2 raised by the assessee is allowed.

20. Ground No. 3 raised by the assessee is challenging the addition made in the sum of Rs. 8,91,000/- on account of closing balance outstanding in respect of sundry creditor.

21. We have heard the rival submissions and perused the materials available on record. The Id AO observed that the sub-contractor Shri Shambhu Paswan account was reflected as credit balance as on 31.03.2011 amounting of Rs. 8,91,000/- in the balance sheet of the assessee. Summons u/s 131 was issued to the said party by the Id AO on 13.12.2013. Shri Shambhu Paswan appeared before the Id AO and statement was recorded on oath from him on 20.12.2013. Shri Shambhu Paswan provided all the details of bills raised on the assessee and explained the complete modus operandi adopted in the business. On a specific query raised by the Id AO with regard settlement of dues outstanding as on 31.03.2011, Shri Shambhu Paswan confirmed that the entire payment of dues as on 31.03.2011 has been received by him in the same financial year by showing as cheques in hand. In other words, certain cheques were received by him from the assessee and those cheques were retained by him as on 31.3.2011 by reflecting it as 'cheques on hand' in the balance sheet. The Id AO observed that in the books of account of Shri Shambhu Paswan, he has not shown any amount as receivable from the assessee as on 31.03.2011. When this was confronted to the assessee by the Id AO, the Id AR of the assessee submitted that in the balance sheet of Shri Shambu Paswan, a sum of Rs. 10,72,580/- is reflected as cheques on hand which corresponded to the amount unpaid from the assessee. The Id AO did not believe this explanation on the ground that if at all cheques have been issued by the

assessee to Shambhu Paswan, then there would be no need to show the sum as outstanding balance in the books of the assessee as on 31.03.2011. Accordingly, the Id AO treated the closing balance of Shri Shambu Paswan as on 31.03.2111 amounting to Rs. 8,91,000/- as not genuine liability and proceeded to add the same. This action of the Id AO was upheld by the Id CIT(A).

22. The Id AR before us stated that the cheques were issued by the assessee to Shambu Paswan and those cheques had reached the custody of Shri Shambhu Paswan as on 31.03.2011. The assessee had to make arrangement for certain funds, hence the assessee had requested Shri Shambhu Paswan to hold the cheques and deposit the same in later point of time. However, Shri Shambhu Paswan had knocked off the total dues from the assessee by considering the cheques on hand with him by giving corresponding credit to the account of the assessee in his books of account. This is the reason how a sum of Rs 8,91,000/- is shown as outstanding amounts payable by the assessee in the account of Shri Shambhu Paswan but Nil balance was shown in the books of Shri Shambhu Paswan. The Id AR however to buttress this argument placed reliance on the page 48 of the Paper Book containing the certificate issued by Oriental Bank of Commerce Manager very clearly stating that a sum of Rs. 8,91,000/- has been deposited in the account of Shambhu Paswan on 11.04.2011 and 29.06.2011 in the following manner:-

Date	Cheque No.	Amount No.
11.04.2011	763210	4,95,000
29.06.2011	703293	3,96,000
	Total	8,91,000

23. We find from the perusal of the aforesaid facts that a sum of Rs. 8,91,000/- which shown as a closing balance as on 31.03.2011 to the account of Shri Shambhu Paswan in the books of the assessee has been duly paid by the assessee within 1st quarter of next Financial year. We have also seen the corresponding debit made in the bank statement of the assessee on 11.04.2011 and 29.06.2011 which are enclosed in pages 49 to 50 of the paper book. From these facts staring on us, there is absolutely no case for the revenue to treat the balance outstanding as not a genuine liability by believing the books of account of Shri Shambhu Paswan to be sacrosanct. Accordingly, ground No. 3 raised by the assessee is allowed.

24. In the result, the appeal of the assessee for AY 2011-12 is partly allowed.

ITA NO. 1632/Del/2020 (AY 2018-19)

25. The only effective issue to be decided in this appeal is whether the Id CIT(A) was justified in confirming the disallowances made on account of PF & ESI dues which were remitted beyond the due dates prescribed under the respective Acts but before the due date of filing income tax return u/s 139(1) of the Act.

26. We have heard the rival submissions and perused the materials available on record. It is not in dispute that the employees' contribution to provident fund and ESI were deposited by the assessee to the Government account beyond the due dates prescribed under the respective acts but well before the date of filing the return of income. We find that the recent decision of the Hon'ble Supreme Court in the case of Checkmate Services Pvt. Ltd Vs. CIT reported 448 ITR 518 had settled the entire dispute to rest by deciding it in favour of the revenue by observing as under:-

"53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assesseees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the

employee's contribution on or before the due date as a condition for deduction.

55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed."

27. In our considered opinion and pursuant to the aforesaid decision of the Hon'ble Supreme Court, the claim of deduction towards employee's contribution to PF & ESI made by the assessee becomes an incorrect claim warranting prima facie adjustment u/s.143(1) of the Act. Accordingly, the grounds raised by the assessee are dismissed.

28. In the result, the appeal of the assessee for AY 2011-12 is partly allowed and appeal of the assessee for AY 2018-19 is dismissed.

Order pronounced in the open court on 20/10/2023.

-Sd/-
(KUL BHARAT)
JUDICIAL MEMBER

-Sd/-
(M BALAGANESH)
ACCOUNTANT MEMBER

Dated: 20/10/2023
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi