

आयकर अपीलिय अधिकरण, चण्डीगढ न्यायपीठ "बी" , चण्डीगढ
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "B", CHANDIGARH

HEARING THROUGH: HYBRID MODE

श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA NO. 1120/Chd/2017
निर्धारण वर्ष / Assessment Year : 2009-10

M/s Singh Construction Co. H.No. 4028- Urban Estate, Phase-II Patiala	बनाम	The Asst. CIT Circle, Patiala
स्थायी लेखा सं. / PAN NO: AAWFS4870Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारित की ओर से/Assessee by : Shri Vipen Sethi, Advocate and
Shri Shashi Bhushan Galav, Advocate

राजस्व की ओर से/ Revenue by : Shri Dharam Vir, JCIT, Sr. DR

सुनवाई की तारीख/Date of Hearing : 27/02/2024

उद्घोषणा की तारीख/Date of Pronouncement : 07/03/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

This is an appeal filed by the assessee against the order of the Ld. CIT(A), Patiala dt. 05/05/2017 pertaining to Assessment Year 2009-10.

2. In the present appeal, the Assessee has raised the following grounds of appeal:

1. That on facts and circumstances of the case the Ld. CIT(A) is not justified in upholding the rejection of books of account which were never rejected by the Ld. A.O.
2. That, without prejudice to above, in the facts and circumstances of the case after rejection of books of account, the Ld. CIT(A) was not justified in not following the decision of Hon'ble Jurisdictional Tribunal for estimation of income of the assessee from contract business by application of flat rate to gross receipts.
3. That the Ld. CIT(A) is not justified in applying flat rate of 5.74% to the gross receipts and without prejudice, the income estimated is highly excessive.

4. That without prejudice to above the Ld. CIT(A) is not justified in not treating the salaries and interest paid to partners and depreciation allowance as part of the book profits of the firm.
5. That the Ld. CIT(A) is not justified in upholding the finding of the Ld. A.O. that a survey was conducted at the premises of the assessee though the fact was denied by the appellant and no adverse material brought on record by the Ld. A.O. to justify the fact of survey.
6. That without prejudice to above the Ld. CIT(A) has erred in upholding the action of the Ld. A.O. in not treating the amount surrendered by the assessee in the profit and loss account at Rs. 60,00,000/- as part of the income for the year under appeal.
7. That the Ld. CIT(A) is not justified in upholding the addition of Rs. 5,50,000/- on account of credits in the accounts of the partners and, without prejudice, not allowing telescopic adjustment against the additions made/upheld.

3. Before we advert to the grounds of appeal taken by the assessee, it would be relevant to consider the relevant facts of the case as emerging from the records.

4. The assessee is a civil contractor and survey under section 133A was carried out at the business premises of the assessee on 18/02/2009. Subsequently, the assessee filed its return of income declaring total income of Rs. 1,03,53,180/- on 30/09/2009 which was processed under section 143(1) and thereafter selected for scrutiny and thereafter order under section 143(3) was passed on 08/12/2011 wherein the AO invoked the provision of Section 145(3) r.w.s 144, rejected the books of account and estimated the net profit rate of 8% of gross receipt which was worked out at Rs. 1,38,23,095/- and after giving credit of the income also shown in the P&L Account amounting to Rs. 1,03,53,170/-, an addition of Rs. 34,69,925/- was made in the hands of the assessee. Separately, the AO also made an addition of Rs. 5,50,000/- under section 68 on account of unexplained credit in the account of the partners of the assessee firm and as against the returned income of Rs. 1,03,53,180/-, assessed income was determined at Rs. 1,43,73,105/- in terms of order passed u/s 143(3) dated 8/12/2011.

5. Being aggrieved the assessee carried the matter in appeal before the Ld. CIT(A) against the order so passed by the AO dt. 08/12/2011.

6. During the pendency of the appeal before the Ld. CIT(A), Patiala, the Ld. CIT, Patiala invoked his jurisdiction under section 263 of the Act and passed an order dt. 10/03/2014. In the said order, it has been stated by the Ld. CIT Patiala that during the course of survey, certain discrepancy were noticed in respect of cash, stock etc. and the assessee has disclosed additional income of Rs. 65,00,000/- over and above its normal income whereas in the P&L Account, it has only credited a sum of Rs. 60,00,000/- instead of Rs. 65,00,000/-. Secondly, the Ld. CIT, Patiala stated that the net profit of 8% has to be applied on the gross receipt of Rs. 17,27,88,683/- and the additional income of Rs. 65,00,000/- should have been separately added to the net profit so computed and since the AO has given an incorrect set off of additional income surrendered while assessing the assessee's income, the order so passed by the AO was held to be erroneous and prejudicial to the interest of the Revenue and he set aside the assessment order dt. 08/12/2011 and directed the AO to frame the fresh assessment in respect of the issues raised and directions given in the order so passed under section 263 of the Act. Taking into consideration the directions so issued u/s 263, the AO thereafter passed the order u/s 143(3) r/w 263 dated 24/07/2014.

7. The assessee brought the fact as to the passing of the order under 263 by the Ld. CIT, Patiala to the notice of Ld. CIT(A), Patiala and considering the same, the Ld. CIT(A), Patiala vide his order dt. 27/02/2015 dismissed the appeal of the assessee against the original assessment order passed by the AO u/s 143(3) of the Act holding the appeal so filed as infructious in view of the order passed passed by the Ld CIT, Patiala under Section 263 of the Act.

8. The assessee thereafter moved in appeal before the Tribunal in ITA No. 366/Chd/2014 against the order of the Ld. CIT, Patiala dt. 10/03/2014 passed under section 263 of the Act. Separately, another appeal in ITA No.

246/Chd/2016 was filed before the Tribunal against the order of the Ld. CIT(A), Patiala dt. 27/02/2015. The Coordinate Bench vide its order dated 28/12/2016 dismissed both the appeals so filed by the assessee as withdrawn. Before the Coordinate Bench, the assessee moved an application seeking permission to withdraw the said appeals as the appeal of the assessee in quantum proceedings were pending before the Id CIT(A) against the order passed by the AO u/s 143(3) r/w 263 dated 24/07/2014. The Id CIT(A), Patiala has since disposed off the said appeal vide its order dt. 05/05/2017 which is the impugned order before us against which the assessee is again come in appeal.

9. Before we advert to the findings of the Ld. CIT(A) in the impugned order, it would be relevant to refer to the order passed by the AO dated 24/07/2014 pursuant direction of the Ld. CIT, Patiala passed under section 263 dt. 10/03/2014. In the said order dt. 24/07/2014, the AO referring to the original assessment order passed u/s 143(3) held that the net profit rate of 8% has to be applied on gross receipt of Rs 17,27,88,683/- and the additional income of Rs. 65,00,000/- have to be brought to tax separately and considering the income already shown in the profit/loss account, made an addition of Rs. 1,59,69,916/- and the relevant findings of the AO reads as under:

"The Id. AR for the assessee Sh. K.P Bajaj and Sh. Mohit Garg, CA during the hearing raise the point that the amount of Rs.23,83,227/- paid as salary and interest to the partners of the firm should be considered as profit of the firm. The assessee's contention that the credit should be given for salary and interest paid to partners is not tenable and cannot be considered in the fresh assessment order since only issues prejudicial to the interest of revenue is considered in the proceedings of section 263 of the Act as mentioned by the Worthy Commissioner of Income Tax, Patiala.

It is seen that the assessee has itself separately added the surrendered amount of Rupees 60 lacs to the profit and loss account. This amount is separate from both the gross receipts and closing stock shown in the profit and loss account. It is clear, therefore, that the surrendered amount of Rs.60lacs was separate from the normal business activities and income of the assessee. The assessee's contention that it was not found to be doing any other income earning activity and that, therefore, on this account alone the sum of Rs.60 lacs was required to be treated as profits of the business is not tenable. The amount surrendered during the course of survey on account of unexplained stock or cash is required to be deemed

income of the assessee u/s 69 of Act. In the case of Faqir Mohammad Hazi Hasan vs CIT 247 ITR 290 (Gujarat), the Hon'ble High Court has held that the entire surrendered income should be treated as independent of regular income and taxed accordingly. Similar view has been taken by the Hon'ble ITAT, Chandigarh Bench, Chandigarh in their order dated 30.04.2010 in the case of M/s Kim Pharma (P) Ltd. Vs. ITO, Ward-1 Ambala Cantt, Ambala in ITA No.189/Chd/2010. The surrendered amount is, therefore, clearly over and above the income in respect of the transactions recorded in the books of account of the assessee and there is nothing to suggest that the unaccounted stock etc. surrendered was out of transactions recorded in the books of accounts.

During the course of survey, certain discrepancies were noticed in respect of cash, stock etc. You had disclosed an additional income of Rs.65 lakhs other than normal income. Your profit & loss account showed, however, that you credited only Rs 60 Lakhs on account of surrendered income instead of Rs.65 Lakhs to your P&L account. The net profit shown in the P&L account by you was Rs.1,03,53,180/- From the earlier order passed u/s 143(3) of the Act (page 8), it can be seen that the AO made the computation as under :-

8% of total receipts of Rs. 17,27,88,683/-	: Rs. 1,38,23,095/-
Already shown	: Rs. 1,03,53,170/-
Balance Addition	: Rs. 34,69,925/-

It is apparent that the net profit rate of 8% was to be applied to your receipts, and the additional income of Rs.65 lacks should have been added to such net profit. The appropriate treatment applicable in this case to the disclosed amount of Rs.65 Lacs is, therefore, as follows:

8% of total receipts of Rs. 17,27,88,683/-	: Rs. 1,38,23,095/-
Already shown	: Rs. 43,53,179/-
(After reducing the disclosure wrongly taken to P/L A/C)	
Balance Addition	: Rs. 94,69,916/-
Addition under the head of unexplained Income	: Rs. 65,00,000/-
Total addition on this issue	: Rs. 1,59,69,916/-

Therefore, an addition of Rs.1,59,69,918/- is made on account of undisclosed income. Penalty proceedings u/s 271(1)(c) of the Income Tax Act, 1961 are initiated for concealment or furnishing inaccurate particulars of income."

10. Against the said findings and the order of the AO, the assessee moved in appeal before the Ld. CIT(A) wherein the Ld. CIT(A) directed the AO to apply net profit of 5.74% which has been computed based on past history of the assessee after the depreciation, interest and salary to the partners after due verification. Further, he directed to treat the surrendered income at Rs. 60,00,000/- as against Rs. 65,00,000/- considered by the AO under section 69 of the Act over and above normal business income of the assessee firm. As far as

addition of Rs. 5,50,000/- in respect of unexplained deposit in the capital account of the partners, the addition so made by the AO were confirmed.

11. Against the said findings, it is noted that both the Revenue and the assessee moved in appeal before the Tribunal. The Revenue moved in appeal against the action of the Id CIT(A) in applying rate of net profit of 5.74% as against 8% applied by the AO whereas the assessee moved in appeal against the addition sustained by the Id CIT(A). The appeal of the Revenue in ITA No. 1205/CHD/2017 was dismissed by the Coordinate Bench due to low tax effect vide its consolidated order dated 04/09/2019. The assessee appeal has now come up for adjudication before us.

12. In the aforesaid background, we refer to the contentions advanced by the Ld. AR. During the course of hearing, in context of ground of appeal no. 2,3&4, it was submitted that the Ld. CIT(A) was not justified in directing the application of flat rate of net profit @ 5.74% on the basis of past history of the assessee and it was submitted that interest, salary and depreciation should be allowed out of the income so estimated and our reference was drawn to the working of the net profit as under:

Profit @ 8% on gross receipts of Rs. 17,27,88,683/-		1,38,23,095
Less: Salaries & interest to partners	2383227	
Depreciation	<u>6040393</u>	84,23,620

		53,99,475
Income taken to be business income		43,53,180

Balance addition as per the percentage of 8%		10,46,295

13. It was submitted that where the rate of 8% as applied by the AO is substituted by rate of 5.74% as applied by the Id. CIT(A), there will be no case for any addition in the hands of the assessee and it was accordingly submitted that necessary relief be provided to the assessee.

14. The second contention which was raised by the Id AR in the context of ground of appeal no. 7 relates to unexplained credit in the account of the partner which has been sustained by the Id CIT(A). It was submitted that the deposits aggregating to Rs. 5,50,000/- in the account of the partners were explained to be from agriculture land and which has been duly shown in the respective tax returns so filed by the partners. It was submitted that the proof of ownership of land and declaration of agriculture income was filed but the explanation of the assessee was turned down as no proof in the shape of 'J' forms showing sale of produce was submitted. It was submitted that as far as the assessee firm is concerned, it has discharge the necessary burden by showing that the income has been duly declared in the personal tax returns so filed by the partners of the assessee firm and therefore there is no basis for making the addition in the hands of the assessee firm.

15. No arguments were advanced in respect of ground of appeal no. 1 during the course of hearing. Similarly, ground of appeal no. 5 &6 were withdrawn during the course of hearing.

16. Per contra, the Ld. DR submitted that the grounds of appeal taken by the assessee in the present appeal don't arise out of the assessment order. In this regard, our reference was drawn towards original assessment order dated 08.12.2011 wherein provision of section 145A r.w.s 144 of Income Tax Act were invoked by the AO and net rate as estimated and separate addition on account of un-satisfactory explanation regarding addition of capital by partners were made. It was submitted that the assessment order was accepted by the assessee and no further appeal was filed. The Ld. CIT in his order under section 263 has only set aside the matter on two issues namely, while giving the credit for net income declared by the assessee, credit of Rs.60,00,000/- surrendered by the assessee should not be given and separate addition should be made and

secondly, the surrender income should be Rs. 65,00,000/- instead of Rs.60,00,000/- as declared and accepted by the Assessing Officer.

17. It was submitted that it is a settled proposition of law that the Assessing Officer while passing assessment order in consequence to the revisionary order u/s 263 of Income Tax Act 1961 can consider only those matters which were before the CIT. The Assessing Officer cannot consider any matter other than the issues arising out of revisionary order under section 263 of Income Tax Act 1961 and in support, reliance was placed on following two decisions:

i) The Assessing Officer was held entitled to consider only those grounds which were considered by the Commissioner and not any other items to make fresh assessment - CIT v. D. N. Dosani [2006] 280 ITR 275 (Guj.)(HC)

ii) Revision is not like reopening of assessment, entire assessment is not opened before the Assessing Officer - Geometric Software Solutions Co. Ltd. v. ACIT [2009] 32 SOT 428 (Mum.)(Trib.).

18. It was accordingly submitted that none of the grounds of appeal survive for consideration of the ITAT bench except ground No.6 of the assessee's appeal which is anyways withdrawn by the assessee during the course of hearing. It was submitted that this addition contested vide ground No.6 has been made by the Assessing Officer keeping in view the jurisdictional High Court's judgment and statement of assessee's firm's partners confronting the documents found during the course of survey.

19. The Ld. AR in his rejoinder submitted that the contention of the Id DR is based upon the wrong presumption and is denied as the grounds of appeal do arise out of assessment order. It was submitted that the order u/s 143(3) dated 08.12.2011 was challenged in appeal by assessee before the CIT (A) which was filed on 06.01.2012. It was submitted that assessee has filed the appeals against

both the orders of AO i.e. order dated 08.12.2011 and order u/s 143(3) read with section 263 dated 24.07.2014.

20. It was further submitted that the facts mentioned in case of in the case of CIT V D.N. Dosani (supra) is not applicable in as much as that while passing the order u/s 143(3) read with section 263 on 24.07.2014, no fresh addition was made by the AO in his order except that of addition of Rs 60 Lakhs as per direction of the order of Id Commissioner Income Tax vide his order dated 10.03.2014. It was submitted that the decision of ITAT Mumbai in the case of Geometric Software Solutions Co Ltd Vs ACIT (supra) is also distinguishable as in that case, the assessee has filed the appeal before the ITAT Mumbai against the order u/s 263 passed by Id Commissioner of Income Tax, whereas in the instant case the assessee has filed the appeal against the order passed u/s 143(3) read with section 263 of CIT (A), Patiala before the Tribunal.

21. We have heard the rival contentions and perused the material available on record. We find that the present appeal arise out of the assessment order passed by the AO u/s 143(3) r/w 263 dated 24/07/14. In the revision order so passed by the Id CIT, Patiala, as we have noted above, the Ld. CIT Patiala stated that during the course of survey, certain discrepancy were noticed in respect of cash, stock etc. and the assessee has disclosed additional income of Rs. 65,00,000/- over and above its normal income whereas in the P&L Account, it has only credited a sum of Rs. 60,00,000/- instead of Rs. 65,00,000/-. Secondly, the Ld. CIT, Patiala stated that the net profit of 8% has to be applied on the gross receipt of Rs. 17,27,88,683/- and the additional income of Rs. 65,00,000/- should have been separately added to the net profit so computed and since the AO has given an incorrect set off of additional income surrendered while assessing the assessee's income, the order so passed by the AO was held to be erroneous and prejudicial to the interest of the Revenue and he set aside the assessment

order dt. 08/12/2011 and directed the AO to frame the fresh assessment in respect of the aforesaid issue.

22. We therefore find that the limited issue which was raised by the Id CIT and subject matter of revision proceedings was in the context of income surrendered by the assessee during the course of survey, the treatment thereof by the assessee in its profit/loss account and how the AO has erred in accepting the treatment as so done by the assessee while offering its income to tax as part of its return of income. The directions were accordingly issued to the AO in the limited context of surrendered income. It is therefore not a case where the whole assessment order was held to be erroneous and set-aside to be framed afresh rather the assessment order was set-aside to the limited extent of correcting the error in treatment of surrendered income for tax purposes.

23. In the consequent proceedings, the AO has also read and understood the directions so given by the Id CIT to the limited extent of treatment of surrendered income separately and not in the context of framing the whole assessment a fresh where all matters are open before him for fresh examination. In fact, it is the assessee who has faltered in appreciating the directions so given and raised the matter before him relating to estimation of net profit and claim of credit of salary and interest to the partners which has been rightly denied by the AO. The AO has therefore not disturbed and rightly so where he reiterated the estimation of net profit @ 8% as done in the original assessment order dated 8/12/2011 and considered the same while framing the assessment u/s 143(3) r/w 263 dated 24/07/14.

24. We also find that the Id CIT(A) has also not properly appreciated the background and context of the directions issued by the Id CIT u/s 263 and passing of the order by the AO u/s 143(3) r/w 263 wherein the assessee has again pleaded against higher estimation of net profit. The Id CIT(A) could not have considered the matter which has already attained finality by passing of

the original assessment order and the appeal against the said order been dismissed as withdrawn. It is a settled legal position that in the fresh assessment order passed pursuant to directions u/s 263, the AO was entitled to consider only those matters in respect of which directions have been given by the Id CIT and not entitled to consider any other matter a fresh for making the additions or for that matter, disturb the matters which have already attained finality while passing the original assessment order. The same reasoning applies to the Id CIT(A) while adjudicating the matter emerging out of the assessment order post issuance of directions in the revision proceedings. There is distinction between the limited set-aside of the assessment order and complete set-aside of the assessment order. Where the whole of the original assessment order has been set-aside, the AO and for that matter, the Id CIT(A) is free to adjudicate the matter arising out of the fresh assessment order. However, in case of limited set-aside, the powers are limited to the matter arising out of directions of the Id CIT.

25. However, the fact of the matter is that in the instant case, the Id CIT(A) has gone ahead and has directed to apply net profit of 5.74% as against 8% applied by the AO. The Revenue apparently sensing the said mistake moved in appeal but the appeal was dismissed by the Coordinate Bench on account of low tax effect and the AO has since given effect to the directions of the Id CIT(A) vide his order dated 01/11/2019 whereby the relief has already been provided to the assessee. The fact that the Id CIT(A) has gone ahead and tinkered with the net profit rate doesn't give any vested right to the assessee to claim further relief which is legally not sustainable.

26. In light of aforesaid discussions, we are unable to accede to the contention of the Id AR regarding further credit for interest, salary and depreciation while determining the net profit rate as the estimation of net profit rate was not subject of revision proceedings and consequent order passed by the AO. Therefore, as far as rate of profit @ 5.74% is concerned, the same has

already attained finality and cannot be disturbed further. The ground of appeal no. 2, 3 & 4 are accordingly dismissed.

27. Similarly, ground no. 7 relating to addition of Rs 5,50,000/- on account of credit in capital account of the partners is dismissed as the same is not arising out of the directions issued by the Id CIT u/s 263 and has already attained finality in terms of original assessment order dated 8/12/2011 which has been reiterated by the AO vide passing the order u/s 143(3) r/w 263 dated 24/07/14.

28. Ground no. 1 is dismissed following the aforesaid reasoning and in any case, no arguments were raised during the course of hearing.

29. Ground no. 5 & 6 are dismissed as withdrawn.

30. In the result, the appeal of the assessee is dismissed.

Order pronounced in the open Court on 07/03/2024.

Sd/-

आकाश दीप जैन
(AAKASH DEEP JAIN)
उपाध्यक्ष / VICE PRESIDENT

Sd/-

विक्रम सिंह यादव
(VIKRAM SINGH YADAV)
लेखा सदस्य/ ACCOUNTANT MEMBER

AG

Date: 07/03/2024

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar