

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : A : NEW DELHI

BEFORE SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.4933/Del/2017
Assessment Year: 2004-05

Bumi Hiwat (India) P. Ltd.,
A1/292, Pankha Road,
Janakpuri,
New Delhi – 110 058.

Vs DCIT,
Circle-5(1),
New Delhi.

PAN: AAHCA4306R

PAN: AABCB5995M

(Applicant)

(Respondent)

Assessee by	: Ms Sashi M. Kapila, Advocate, Shri Parves Sharma, Adv. & Shri Sushil Kumar, Advocate
Revenue by	: Mrs. Sunita Verma, CIT, DR
Date of Hearing	: 05.03.2024
Date of Pronouncement	: 21.03.2024

ORDER

PER ANUBHAV SHARMA, JM:

The appeal is preferred by the assessee against the order dated 29.03.2017 of Commissioner of Income Tax (Appeals)-2, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No.299/2014-15 of CIT(A)-2 arising out of an appeal before it against the order dated 24.12.2010 passed u/s 254/143(3) of the Income Tax Act, 1961 (hereinafter referred to as

‘the Act’) by the DCIT, Circle-3(1), New Delhi (hereinafter referred as the Ld. AO).

2. The assessee company is engaged in the business of construction of Infrastructure projects including projects on turnkey basis of all types and description and related services. The assessee company filed its return of income declaring loss of Rs.9,21,19,770/- on 01.11.2004. The scrutiny assessment in this case was completed u/s 143(3) of the Act on 29.12.2006 assessing the taxable income of the assessee company at Rs.3,73,57,310/-. While passing the assessment order u/s 143(3) of the Act, the AO disallowed the claim of the assessee company of losses of Rs.9,21,19,770/-, estimated the profit of the company at Rs.1,66,52,819/- i.e. 3% of the total turnover of Rs.55,50,93,989/-, disallowed assets written off of Rs.7,52,488/- and also disallowed the PF amounting to Rs.4,11,602/-. Against the order of the AO the assessee filed appeal before the Ld.CIT(A). The Ld.CIT(A) dismissed the appeal of the assessee company.

3. Then the assessee came in appeal before the ITAT against the order of the Ld.CIT(A). The ITAT vide order in ITA No.3849/Dei/2007 dated 31.3.2009 set aside the order of the Ld,CIT(A) as well as that of the AO with the direction that the assessment is to be completed by the AO afresh after giving an opportunity of being heard to the assessee company.

4. The Id. AO, in second round of assessment, had again made the additions and the Id.CIT(A) sustained the same for which the assessee is in appeal raising the following grounds:-

“1. On the facts and in the circumstances of the case, the Learned Commissioner of Income Tax (Appeals)-2 (hereinafter referred to as Ld. CIT (A)) has erred in upholding the disallowance of returned losses of Rs.9,21,19,770/- on account of rejection of books of accounts by the Deputy Commissioner of Income Tax, Circle 3(1) ('Assessing Officer'), New Delhi.

2. The Ld. CIT(A) has erred in law in upholding the order of the Assessing Officer in making addition of Rs. 1,66,52,819/- on account of "Estimation of Profits" @ 3% of the total turnover which is purely made on an adhoc and estimation basis.

3. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in law in ignoring the additional evidences placed on record by the Appellant Company vide application dated 17.01.2012.

4. On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in upholding the order of the Assessing Officer in making addition of Rs. 1,95,40,401 /- on account of "Income from Other Sources" comprising;

a.	Income from Bank	Rs. 5,04,940/-
b.	Other Interest	Rs.67,00,958/-
c.	Misc Income	Rs.55,62,812/-
d.	Profit on Sale of Assets	Rs.2,824/-
e.	Foreign Exchange Fluctuation	Rs.13,83,036/-
f.	Others- Provision no longer required	Rs.53,85,831/-
	TOTAL	Rs.1,95,40,401/-

5. The Ld. CIT(A) has erred in upholding the order of the Assessing Officer in making addition of Rs.7,52,488/- on account of "Assets Written Off".

6. The Ld. CIT(A) has erred in upholding the order of the Assessing Officer in making addition of Rs.4,11,602/- on account of "Disallowance of PF".

7. *The Ld. CIT(A) has erred in upholding the order of the Assessing Officer in making an total addition of Rs.3,73,57,310/- purely on estimation basis.*

8. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in upholding the order of the Assessing Officer in charging interest u/s 234A, 234B & 234C on adjustments and disallowances.*

9. *On the facts and in the circumstances of the case, the Ld. CIT(A) has erred in upholding the order of the Assessing Officer in initiating penalty proceedings u/ s 271 read with Section 274 of I.T. Act, 1961 on adjustments and disallowances.*

The above grounds of appeal are without prejudice to one another. The Appellant craves to add, delete or amend one or more grounds of appeals at the time or before the hearing of the appeal.”

5. Heard and perused the record. It is pertinent to observe that the Tribunal in order dated 31.3.2009 (supra) in regard to the issue before us has observed as follows:-

“5. We have heard the parties and considered the rival contentions. The return originally filed was on time. The mere fact that it was filed along with provisional balance-sheet and profit & loss account could not be a ground to treat the same as invalid. At best, it could have been a defective return and for that no notice under section 139 (9) needed to be issued to the assessee. On the contrary, it was processed under section 143(1). In these circumstances, the return cannot be said to be invalid. It was revised later on along with the audited balance sheet and profit & loss account. The assessment, therefore, is to be made on the basis of revised return and the disallowance of loss cannot be made on the ground that there was a wide disparity between the two balance-sheets prepared which was not explained by the assessee. It is a claim of loss in the revised return which was filed and determined as per the books of account of the assessee. We, therefore, set aside the order of the CIT (Appeals) as well as the Assessing Officer and remit the matter back to the file of the Assessing Officer to determine the income of the assessee on the basis of books of account and after giving an opportunity of being heard to the assessee. In these circumstances, the additions on merits i.e. based on the percentage of profit on the turnover, assessment of income from other sources and disallowance of assets written off are not being considered and the parties would be at liberty to canvass their respective grounds in the set aside proceedings. The assessment is to be completed

by the Assessing Officer as per provisions of law and after giving an opportunity of being heard.”

6. However, the ld. AO, apart from making the additions on account of assets written off and disallowance of PF and making an estimation of profits has also made disallowance of ‘other income.’ The AO had also rejected the books of account. Before the ld.CIT(A), additional evidences were filed and the same have been dismissed by the ld.CIT(A) with the following relevant findings:-

“During the course of appellate proceedings, the AR of the appellant vide application dated 17.01.2012 filed an application under Rule 46A. enclosing therewith the following:-

- *Details of expenditure, project wise*
- *Copy of provisional and revised financial statements and the reasons for difference*
- *Details of rent paid and copy of TDS challans evidencing proper TDS compliances*
- *Details of assets written off*
- *Ledger copy of the assets written off*
- *Audited Financial Statement of A.Y. 2003-04*
- *Return of Income along with Computation of Income of A.Y. 2003-04*
- *Tax Audit Report of A.Y. 2003-04*

v) In its application for admission of additional evidence, the appellant has itself admitted that assessment proceedings were initiated in July, 2009 and carried out upto December, 2010. Therefore, there seems no reason why the appellant could not have produced the above additional evidences at the assessment stage. Even the Assessing Officer, as per his remand report dated 28.10.2014 has opposed the admission of additional evidence, listing out the various opportunities provided to the

appellant and its repeated failure to comply. Accordingly, the additional evidence submitted at this stage deserves to be not admitted.”

7. One of the grounds before us is that this evidence has been arbitrarily disallowed.

8. Taking into consideration the assessment order, it comes up that after the matter was restored by the Tribunal to the AO, notice u/s 143(2) was issued on 15.07.2009. However, it has been canvassed before us that all the relevant evidences were filed before the ld. AO too. The ld. CIT(A)'s order shows that in regard to estimation of income in sub-para (iv) of para 3.2.1 (findings), the ld.CIT(A) had sustained the additions with the following relevant findings:-

“iv) Considering the facts of the case and arguments of the AR, I find that the appellant failed to produce relevant books of account and other evidences as called for by the AO. In other words, the appellant failed to substantiate the book result. Thus, the AO was justified to reject the books of account and estimate the income of the appellant. As regards percentage of profit applied by the AO, I find that the appellant itself has shown profit margin of 13.4% & 3.8% with respect to Vijayawada and Orissa projects respectively. I further find that the appellant failed to substantiate the loss @ 58% relating to Jallandhar project. In this situation, the AO was justified to estimate the overall net profit @ 3% of the total turnover. Thus, the action of the AO for estimating the net profit @ 3% of the total turnover and determining the business income at Rs.1,66,52,819/- is upheld.”

9. Thereafter, the CIT(A) has proceeded to take into consideration the additional evidence application and then rejected.

10. We fail to appreciate the sequence of the proceedings for determination of the relevancy and admissibility of additional evidences after deciding an issue on

merits. The Id.CIT(A) seems to have fallen in error in first taking up the issue on merits and deciding it against the assessee and then going to decide on the application of the assessee for additional evidences. Thus, we are inclined to allow ground No.3 and set aside the order of the Id.CIT(A) on merits with the direction to admit the additional evidences and thereafter, pass a fresh order. Needless to say that opportunity of hearing to assessee be also given.

Order pronounced in the open court on 21.03.2024.

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 21st March, 2024.

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Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Asstt. Registrar, ITAT, New Delhi