

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI RAHUL CHAUDHARY (JUDICIAL MEMBER)**

**ITA No. 3342/MUM/2023
Assessment Year: 2010-11
&
ITA No. 3345/MUM/2023
Assessment Year: 2013-14**

Dy. CIT-5(2)(1),
5th floor, R.N. 571,
Aayakar Bhavan,
Churchgate,
Mumbai-400020.

Appellant

JSW Jaigarh Port Ltd.,
5th floor, JSW Centre, Bandra
Kurla Complex, Bandra East,
Mumbai-400051.

Vs.

**PAN NO. AABCJ 7959 F
Respondent**

Assessee by : Mr. Rakesh Joshi
Revenue by : Ms. Rajeshwari Menon, DR

Date of Hearing : 25/04/2024
Date of pronouncement : 30/04/2024

ORDER

PER OM PRAKASH KANT, AM

These two appeals filed by the Revenue filed electronically are directed against two separate orders, dated 27.07.2023 and 24.07.2023, passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi for assessment



years 2010-11 and 2013-14 respectively. As common issue in dispute is involved in these appeals, therefore, same were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

2. The grounds of appeal raised by the Revenue for assessment year 2010-11 in ITA No. 3342/M/2023 are reproduced as under:

1. *"Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT (A) was justified in deleting the disallowance made of depreciation claim Rs.6,94,43,326/- admitting the additional evidences under Rule 46A even though the assessee has not fulfilled the following conditions under Rule 46A: a. Where the [Assessing Officer] has refused to admit evidence which ought to have been admitted; or b. Where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the [Assessing Officer]; or c. Where the appellant was prevented by sufficient cause from producing before the [Assessing Officer] any evidence which is relevant to any ground of appeal; or d. Where the [Assessing Officer] has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal."*

2. *"Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in deleting the disallowance made without appreciating the facts that the depreciation claim on assets for which bills were not produced by the assessee for the assessment year 2010-11 was Rs.138,88,66,528/- of which depreciation claim at the rate of 5% which was Rs.6,94,43,326/- was disallowed."*

3. *"Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT (A) was justified in deleting addition on account of the Berth Hire Income of Rs. 63,16,668/- holding that birth hire income earned during the trial run operation are allocated to the fixed assets and has been already offered by the assessee as pre-commencement income."*

4. *The appellant prays that the order of the CIT(A) on the grounds be set aside and confirm the order of the AO.*

3. Briefly stated facts of the case are that the assessee company is engaged in the business of development and operation of ports and providing port services. In the assessment completed u/s 143(3) of the Income-tax Act, 1961 (in short 'the Act') dated



28.03.2013 , total loss was determined at Rs.2,67,37,780/-. In the assessment, the Assessing Officer made disallowance **firstly**, of Rs.6,94,43,326/- for depreciation @ 5% on the bills which were not produced during the assessment proceedings amounting to Rs. 138,88,66,528/- and **secondly** , disallowance of Rs.63,16,668/- for the income out of trial run not shown in the profit and loss account.

4. On further appeal, the Ld. CIT(A) deleted both the additions. Aggrieved, the Revenue is in appeal before the Tribunal raising the grounds as reproduced above.

5. As far as ground Nos. 1 & 2 of the appeal of the Revenue are concerned, the Revenue is mainly aggrieved with admission of additional evidence by the ld CIT(A) invoking Rule 46A of the Income-tax Rules, 1962 (in short 'the Rules'). The facts in brief qua the issue in dispute are that during the assessment proceedings, the assessee could not produce bills of Rs. 138,88,66,528/- in respect of fixed assets and therefore, the Assessing Officer disallowed deprecation @ 5% on those bills , which was worked out to Rs.6,94,43,326/-. During the appellate proceedings before the Ld. CIT(A), the assessee filed those bills and vouchers in the form of additional evidence along with application under Rule 46A of the Rules for admitting those additional evidence. The Ld. CIT(A) forwarded those additional evidence to the file of the Assessing Officer under the procedure laid down under Rule 46A of the Rules. The Ld. Assessing Officer in his remand report though examined



and verified the bills, however submitted that those additional evidence should not be admitted for the reason that the assessee failed to produce those bills and vouchers during the course of the assessment proceedings. The Ld. CIT(A) however, admitted the additional evidence submitted by the assessee and deleted the additional observing as under:

“The Assessing Officer has examined additional evidences submitted in the form of 13 box files that were not submitted at the time of assessment proceedings and after detailed verification of such invoices the A.O stated that the same is found correct and acceptable. But without specifying any reasons the AO has requested the CIT(appeals) not to give relief to the assessee based on the additional evidences submitted. This sounds illogical where as one side is accepting the correctness of the evidences and at the same time requesting not to give relief.

From the remand report submitted by the AO it can be clearly understood that the AO has accepted the correctness of the claim and no negative inference was drawn and hence disallowance of Rs.6,94,43,326/- being 5% of the capitalisation amount is not in accordance with the provisions of the Act and hence the, same is deleted. Ground of appeal filed by the assessee is allowed.”

6. We have heard rival submission of the parties and perused the relevant material on record. The only objection of the Revenue is that those additional evidences should not have been admitted by the Ld. CIT(A), being admitted in contravention of provisions of Rule 46A of the Rules. For ready reference, the Rule 46A of the Rules is reproduced as under:

“46A. Production of additional evidence before the Deputy Commissioner (Appeals) and Commissioner (Appeals).

(1)The appellant shall not be entitled to produce before the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals), any evidence, whether oral or documentary, other than the evidence produced by him during the course of proceedings before the Assessing Officer, except in the following circumstances, namely :-



(a) where the Assessing Officer has refused to admit evidence which ought to have been admitted ; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the Assessing Officer ; or

(c) where the appellant was prevented by sufficient cause from producing before the Assessing Officer any evidence which is relevant to any ground of appeal ; or

(d) where the Assessing Officer has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.

(2) No evidence shall be admitted under sub-rule (1) unless the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) records in writing the reasons for its admission.

(3) The Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) shall not take into account any evidence produced under sub-rule (1) unless the Assessing Officer has been allowed a reasonable opportunity-

(a) to examine the evidence or document or to cross-examine the witness produced by the appellant, or

(b) to produce any evidence or document or any witness in rebuttal of the additional evidence produced by the appellant.

(4) Nothing contained in this rule shall affect the power of the Deputy Commissioner (Appeals) or, as the case may be, the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal, or for any other substantial cause including the enhancement of the assessment or penalty (whether on his own motion or on the request of the Assessing Officer) under clause (a) of sub-section (1) of section 251 or the imposition of penalty under section 271."

6.1 Before us the Ld. counsel for the assessee submitted that due to time taken for photocopying of voluminous records of bills and vouchers containing 13 box files, same could not be produced during the course of the assessment proceedings, however, same were produced before the Ld. CIT(A). In our opinion the rule 46A(1)(d) of the Rules take care of such a situation and therefore,



the Id CIT(A) is justified in admitting the evidences. Further, we are of the opinion that when the Assessing Officer himself as verified those bills and vouchers and found to be correct, in the interest of substantial justice objection to additional evidence is not as per terms of Rule 46A. Therefore, we do not find any infirmity in the order of the Ld. CIT(A) on the issue in dispute and accordingly, we uphold the same. The ground Nos. 1 and 2 of the appeal of the Revenue are accordingly dismissed.

7. The ground No. 3 of the appeal of the assessee relate to addition of Rs.63,16,688/- in respect of birth hire income which have been deleted by the Ld. CIT(A).

7.1 We have heard rival submission of the parties and perused the relevant material on record. We find that assessee has earned total birth hire income of Rs.1,28,57,298/-, out of income of Rs.63,16,688/- was earned during the course of the trial run and which was adjusted against trial run expenditure or netted against entire cost of fixed assets/capital work in progress. But according to the Assessing Officer this income of Rs.63,16,688/- was not reflected in the profit and loss account and therefore, he added to the returned income of the assessee. The Ld. CIT(A) has deleted the addition holding that the birth hire charges during the trial run operation to the tune of Rs.63,16,688/- has already been offered by the assessee. We agree with the finding of the Ld. CIT(A) and do not find any infirmity in the same as the income during the trial run



has gone to reduce the cost of the assets and thus directly income stand offered to tax. The ground No. 3 of the appeal of the Revenue is accordingly dismissed.

8. Now we take up the appeal of the Revenue for assessment year 2013-14. The grounds raised by the Revenue are reproduced as under:

1. "Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT (A) was justified in deleting the disallowance made of depreciation claim Rs.6,94,43,326/- relying on the decision of the Ld.CIT(A) for A. Y.2010-11 wherein the Ld. CIT(A) deleted the similar disallowance admitting the additional evidences under Rule 46A even though the assessee has not fulfilled the following conditions under Rule 46A in the said A.Y.

2 "Whether, on the facts and in the circumstances of the case and in law, the Ld.CIT(A) was justified in deleting the 10% of the disallowance made out of total CSR expenses without appreciating the facts that the assessee had not produced any documentary evidences in respect of the above expenses.

3 The appellant prays that the order of the CIT(A) on the grounds be set aside and confirm the order of the AO.

9. The ground No. 1 of the appeal of the Revenue is identical to the ground No. 1 raised in assessment year 2010-11 and therefore, following our finding in assessment year 2010-11, this ground of appeal of the Revenue is dismissed.

11. The ground No. 2 of the appeal of the Revenue relates to deleting the 10% of the disallowance made out of total CSR expenses. The relevant finding of the Ld. CIT(A) on the issue in dispute is reproduced as under:

"Ground No. 2:



This ground pertain to adhoc disallowance of Rs.4,57,884/- which is 10% of the CSR expenses claimed by the assessee during the year under consideration. The Assessing Officer in his order while making disallowance at the rate of 10% has stated that it is not possible to ascertain whether entire amount of Rs.45,78,842/- has been expended towards Corporate Social Responsibility expenses, of the assessee company and further has stated that this disallowance is being made following the stand taken for AY 2011-12. The Assessing Officer has not drawn the basis to arrive at such conclusion and has not found any invalid/inadmissible documentary evidences. The Assessing Officer is duty bound to bring out detailed facts on record before modifying the taxable income. Adequate materials should have been gathered and placed on record on to established that it warrants upwards modification of the taxable profit. Based on the facts available on record, it is observed that the Assessing Officer had not pointed out any non-genuine entries in the books of accounts of the assessee and has not established that any particular expenditure has not been wholly and exclusively incurred for the purpose of business. Further, the AO has not found any expenditure to be bogus or fictitious. Hence, the addition made by the Assessing Officer is considered unwarranted and the same is deleted. Grounds of appeal of this issue stand allowed”.

11.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. We find that that the Assessing Officer has made ad-hoc disallowance @ 10% Corporate Social Responsibility (CSR) expenses on the ground that it was not possible to ascertain whether the entire amount of Rs.45,78,842/- had been expended towards Corporate Social Responsibility expenses. Under the scrutiny process, it is the responsibility of the Assessing Officer to verify the bills and vouchers of the expenses if he was having any doubt, but he cannot be permitted to make ad-hoc disallowance without verifying the genuineness of the expenses. In our opinion, the Ld. CIT(A) is justified in deleting the said ad-hoc disallowance. We do not find any infirmity in the order of the Ld. CIT(A) in deleting the disallowance following the binding precedent on the issue in



dispute. The ground No. 2 of the appeal of the Revenue is accordingly dismissed.

12. In the result, both the appeals of the Revenue are dismissed.

Order pronounced in the open Court on 30/04/2024.

Sd/-
(RAHUL CHAUDHARY)
JUDICIAL MEMBER

Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;
Dated: 30/04/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai