

**IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "A", PUNE**

**BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
MS ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No.302/PUN/2024
Assessment Year : 2014-15**

DCIT, Circle – 1, Nashik	Vs.	Harsh Constructions Pvt. Ltd. Sanskruiti, Murkute Colony, New Pandit Colony, Sharanpur Road, Nashik – 422002
		PAN: AACCH2277H
(Appellant)		(Respondent)

Assessee by : Shri Dhiraj S. Dandgaval
Department by : Shri Ramnath P Murkude
Date of hearing : 03-07-2024
Date of pronouncement : 10-07-2024

ORDER

PER R.K. PANDA, VP :

This appeal filed by the Revenue is directed against the order dated 20.12.2023 of the CIT(A) / NFAC, Delhi relating to assessment year 2014-15.

2. The Revenue in the grounds of appeal has challenged the order of the Id. CIT(A) in restricting the disallowance to Rs.2,24,191/- as against Rs.1,25,51,607/- proposed by the Assessing Officer in the remand report as against Rs.4,38,96,880/- added by him in the order passed u/s.143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3. Facts of the case in brief, are that the assessee is a company engaged in the business of construction of road & bridge for various Government and Semi-government departments. It has filed its return of income on 30.09.2014 declaring total income of Rs.10,45,56,010/-. The case was selected for scrutiny under CASS

and statutory notices u/s.143(2) and 142(1) of the Act were issued and served on the assessee, in response to which the AR of the assessee filed the requisite details from time to time.

3.1 During the course of assessment proceedings, the Assessing Officer noted that the assessee has incurred huge expenditure under the head 'Other expenses'. On being asked by the Assessing Officer, the AR of the assessee submitted the details of sub-contractor expenses. The Assessing Officer issued notice u/s.133(6) of the Act to 45 sub-contractors for verification of the genuineness of the transaction of sub-contract and identity of the sub-contractors. Since some of the sub-contractors failed to file their submissions in response to the notice u/s.133(6) of the Act, the Assessing Officer called for explanation from the assessee. In response to the same, the assessee submitted that since the time given to the sub-contractors was very short, some more time may be granted to these parties. Further, the assessee is a huge company which carries out regular internal audits and is also audited by ISO and tax authorities, etc. It was submitted that the internal controls are rigid and all the payments are made through proper banking channel and due TDS has been deducted. Similar payments have been made in the past years also and no such disallowance was made.

3.2 However, the Assessing Officer was not satisfied with the arguments advanced by the assessee and made an addition of Rs.4,41,21,079/- in respect of 13 sub-contractors by regarding as under:

“5.2 Submission of the assessee has been perused and considered but not acceptable. On verification of the record it was observed that the various parties as sub-contractor were not responded the notice u/s 133(6) of the I.T. Act. Some of

the parties were not served the notice u/s 133(55 of the I.T. Act. Further, assesses was given another opportunity vide noting dated 15.12.2016 to produce the Running Account bill, work order and measurement books for work so that the genuineness of the work can be proved. AR of the assessee has produced the above said requirement but some of the cases he has unable to produce any evidence. Also since the parties have not given any submission and some notices returned as un-addressed, the identity of the sub-contractors is in sever doubt. It becomes the liability of the assessee to produce all relevant documents to prove the genuineness of sub-contract work and identity of sub-contractor. The assessee has failed to submit these details. From verification of the submission made by assessee and material available on record, it appears that the following sub-contractors are bogus and non-genuine.

Sr.No.	Name of the Party	Sub-contract expenditure claimed by the assessee as bogus and non-genuine	Remark
1	SHRI KHUSHIRAM RAMKUMAR PAL	2525253	Notice u/s 133(6) served but reply is not received
2	SHRI ASHOK MESHARAM	4421804	Notice u/s 133(6) served but reply is not received
3	SHRI ASIM BISWAS	4845381	notice u/s 133(5) served but reply is not received
4	GANNON INTERNATIONAL	1,12,955	Notice u/s 133(6) is not served by postal Remark "Incomplete Address". Further, AR has produced bill for verification the difference of Rs.1,12,955/- appeared.
5	GGG DESIGNERS FEBRICATORS PVT. LTD.,	16876451	Notice u/s 133(6) served but reply is not received
6	GUDDU SINGH	5,00,615	Notice u/s 133(6) served but reply is not received. Further, AR has produced bill for verification the difference of Rs.5,00,615/-appeared.
7	HARSHIT MANDAL	2352351	Notice u/s 133(6) served but reply is not received
8	LALDHAR CHAVAN,	2538706	notice u/s 133(6) served but reply is not received
9	M.K. ELECTRO SOLUTIONS	4536350	notice u/s 133(6) served but reply is not received
.10	MAYUR ENTERPRISES	99,871	Notice u/s 133(5) served but reply is not received. Further, AR has produced bill for verification the difference of Rs.1,12,955/- appeared.
11	R.K.FABRICATORS	1,88.260	Notice u/s 133(6) served but reply is not received. Further, AR has produced bill for verification the difference of Rs.5,00,515/- appeared.
12	RAMEETSWGH	2567925	Notice u/s 133(6) served but reply is not Received

13	SADDA MANSARI	2554157	Notice u/s 133(6) is not served by postal remark "Not traceable"
		4,41,21,079/-	

5.3 From the above discussion, facts and circumstances of the ease, I have disallowed the sub-contract expenses of Rs.4,43,21,079/- as bogus and non-genuine under the provision of section 37 of the I.T. Act, 1961 and has added to the total income of the assessee. Penalty proceedings u/s 271(1)(c) is initiated separately for furnishing inaccurate particulars of income."

4. Before the CIT(A), the assessee filed certain details, based on which the ld.CIT(A) sought remand report from the Assessing Officer, who proposed an addition of Rs.1,25,51,607/-. After considering the remand report of the Assessing Officer and rejoinder of the assessee to such remand report, the CIT(A) restricted the disallowance to Rs.2,24,191/- as against Rs.1,25,51,607/- proposed by the Assessing Officer in the remand report by observing as under:

"6.....

I have carefully considered the appellant submissions, judicial pronouncement quoted by the Appellant and Assessment Order. It is a fact on the record that the Ld. Assessing Officer has made the Addition of Rs.4,41,21,079/- on account of sub-contractors expenses holding as bogus and non-genuine due to non-compliance of notices issued u/s 133(6) of the Income Tax Act, 1961 issued to various sub-contractor. Further, during the remand report proceeding, the Ld. Assessing officer has proposed the addition of Rs.1,25,51,607/- instead of addition of Rs.4,41,21,079/- as earlier made after due verification, details of such addition are as under:

SR No	Name of the Party	Addition made by the Ld. A O in Assessment order	Addition proposed by the Ld. Assessing Officer in Remand Report
1	Shri. Khushiram Ram Kumar Pal	25,25,253/-	25,25,253/-
2	Shri. Ashok Meshram	44,21,804/-	31,613/-
3	Shri.Asim Haran Biswas	48,46,381/-	48,46,381/-
4	Gannon International	1,12,955/-	1,12,955/-

5	<i>GGS Designers Fabricators Pvt Ltd.</i>	1,68,76,451/-	11,093/-
6	<i>Guddu Singh</i>	5,00,615/-	Nil
7	<i>Harshit Mondal</i>	23,52,351/-	23,52,351/-
8	<i>Laldhar Chavan</i>	25,38,706/-	Nil
9	<i>M.K Electro Solution</i>	45,36,350/-	24,49,495/-
10	<i>Mayur Enterprises</i>	99,871/-	58,530/-
11	<i>R.K. Fabricators</i>	1,88,260/-	1,18,936/-
12	<i>Ranjeet Singh</i>	25,67,925/-	Nil
14	<i>Saddam Ansari</i>	25,54,157/-	10,000/-
	<i>Total</i>		1,25,51,607/-

Further, in this case, the appellant has submitted an application under rule 46A of the Income Tax Rule, 1962 and the appellant has mentioned that during the assessment proceeding, the Ld. Assessing Officer has issued notice u/s 133(6) of the Income Tax Act, 1961 to the various parties and some of the notices were not replied within prescribed time due to various reasons and the Ld. AO has made the addition on the basis of the same, which was not in control of the appellant. Now, after considering facts of the case and the submission of the appellant, the application under rule 46A of the Income Tax Rule, 1962 is accepted as per Clause 1(d) of Rule 46A of the Income Tax Rule, 1962 as the AO has failed to give opportunity of the enquiry/verification conducted u/s 133(6) of the Income Tax Act, 1961 before making addition. Further, following ratio of various courts including the Hon'ble Supreme Court in case of Tek Ram Vs. CIT, 262 CTR 118 (SC) in which Hon'ble Supreme Court admitted the additional evidence being relevant and required to be looked into.

Further, I relied upon various judgements in said matter, as under :

1. Hon'ble High Court of Delhi in the case of Commissioner of Income Tax vs Manish Build Well (P) Ltd. 204 Taxman 106 (Del) wherein their lordships held that once the assessee invokes Rule 46A of the Rules and prays for additional evidence before the Commissioner of Income Tax(A), then the procedure prescribed in the said Rule has to scrupulously followed. Otherwise it would reduce Rule 46A to a dead letter.

2. Hon'ble Delhi High Court in the case of CIT v. Virgin Securities and Credits P. Ltd (2011) 332 ITR 396 (Del), held that the CIT(A) should admit the additional evidence if he finds that the same is crucial for the disposal of the appeal.

3. Further, Hon'ble Delhi High Court in the case of Chandrakant Chanu Bhai Patel 202 Taxman 262, held that if additional evidence is without any blemish and in order to advance the cause of justice, the same ought to be admitted.

Analysis with regard to Sub-Contractor Shri. Khushiram RamKumar Pal, Shri. Asim Haran Biswas and Shri Harshit Mondal During the appellate proceeding, remand report with regard to proposed addition related to the transaction with

Shri. Khushiram RamKumar Pal, Shri. Asim Haran Biswas and Harshit Mondal, the appellant has contended that Confirmation of sub-contractors, copy of ledger, Form 16 showing deduction of TDS and copies of bills has been submitted and the appellant company has also furnished the bank statement showing the payment made by the appellant company.

Further, the appellant company has contended that all the conditions as mentioned in the section 37(1) of the Act, 1961 has been fulfilled by the appellant company, detail of provisions are as under:

- 1. Any expenditure not being expenditure of the nature described in sections 30 to 36;*
- 2. Any expenditure not being in the nature of capital expenditure or personal expenses of the assessee;*
- 3. Any expenditure laid out or expended wholly and exclusively for the purposes of the business or profession.*

Furthermore, the appellant company has contended that it has discharged its primary onus that said expenditure has been incurred wholly and exclusively for the purposes of the business by submitting confirmation, copy of ledger, Form 16 showing deduction of TDS and copies of bills raised. Further, the AO has made the addition on account of non-filing of income tax return by the sub-contractor without bringing any material evidence to disprove/controvert the evidences produced by the appellant. In this regard, the contention of the appellant has been carefully perused and the same is found to be tenable and acceptable.

Further, with regard to transaction with Shri. Khushiram RamKumar Pal, the AO has contended that during the course of remand proceeding, the AO has observed that Rs. 25 lakh has been withdrawn in cash on the same date of receipt by the sub-contractor, therefore same is liable to be added in the income of the assessee as the assessee has failed to substantiate these facts with details and documentary evidences. In this connection, it is to be established that by furnishing the Form 16, bills raised, confirmation and copy of ledger of the party, the appellant company has been able to discharge its primary onus of proving the nexus/fact that the expenses has been incurred for object and purpose of the business.

Further, the contention of the AO that Rs. 25lakh has been withdrawn in cash is the special fact and the reason for, the same is known to the party from whose account the cash has been withdrawn, as the deposit/withdrawal in the shape of cash is incidental to the appellant's business/operational requirement of account holder i.e., sub-contractor in this case and only account holder party is able to explain the object and purpose .of cash withdrawal. Hence, the AO was duty bound to further 'enquire from sub-contractor for the circumstances under which he had withdrawn the cash. It is relevant to mention here that suspicion which is being generated on account of immediate cash withdrawal by sub-contractor, has to be further enquired and substantiated to establish it otherwise. It is a trite law that suspicion which is howsoever may be strong cannot take the place of proof/evidence. It may be a good lead for further investigation and enquiry, which the AO has not conducted to establish the nexus between cash withdrawal and its use otherwise leading to addition in the hand of assessee.

Therefore, on the basis of above fact and circumstance, the Ld. Assessing Officer is not justified in making the addition on the basis of conjecture hence the contention of appellant is found to be tenable and acceptable.

Analysis with regard to Sub-Contractor M.K Electro Solution

Further, during the appellate proceeding, remand report with regard to proposed addition related to the transaction with subcontractor M.K Electro Solution, the appellant company contended that it is an industry practice where the PWD (Govt. Dept.) pays the assessee a mobilization advance before commencing the site-work which is later on deducted from further bill-payments to assessee. Similarly, the appellant had paid an advance to its sub-contractor and TDS is applicable on such advance payment as per the provisions of Section 194C of the income Tax Act, 1961. The appellant has further contended that in this case, surprisingly, the Ld. Assessing Officer has made a remark that assessee has not booked the expenses of Rs.24,49,495/-(69,64,095-45,14,600) whereas as per accounting principle, advance payment to contractor can not be booked as expenses and again, what has not been claimed as expense cannot be added to the income. Therefore, the Ld. Assessing Officer has not applied the basic principle of accounting before giving the said observation and same is bad in law. In this regard, contention of the appellant has been carefully perused and considered and the same is found to be tenable and acceptable.

Analysis with regard to Sub-Contractor R K Fabricators

Further, remand report with regard to proposed addition related to the transaction with sub-contractor R K Fabricators on account of TDS deduction on higher amount, the appellant company has furnished confirmation of sub-contractor, ledger account extract of R K Fabricators in the books of assessee and vice versa . The appellant has also submitted Form 16A which indicates the expense incurred by the assessee towards the said party. Therefore, the appellant company has discharged its primary onus and the AO has not brought any material evidence to disprove/controvert the evidences produced by the appellant. Therefore, the said contention of appellant is considered and found to be tenable 'and acceptable.

Analysis with regard to Sub-Contractor Shri Ashok Meshram, Gannon International, GGS Designers Febricators Pvt. Ltd, Mayus Enterprises and Saddam Ansari

Further, with regard to minor difference of Rs.2,24,191/-(31613+112955+11093+58530+10000) in balance of various sub contractor, the appellant company has contended that said differences are nominal in nature and in any business there are always certain minor ledger differences in normal course, which doesn't make the said amount of

difference as non-genuine. There are always certain minor expenses which are recorded to be incurred by a sub-contractor which are not acceptable to the principal-contractor. In this regard, the contention of the appellant was considered and found that the appellant has not been able to substantiate/justify such differences with supporting evidence therefore, the said contention of appellant is not found tenable.

Furthermore, to substantiate the contention, the appellant has relied upon various judgements of Courts/Tribunals in support its arguments, the details of which are as under:

- *In the case of JCIT vs. Shalimar Housing & Finance Ltd (I.T.A. No.4079/Mum/2019), the AO had made an addition of Rs. 13.10 Crores u/s 68 w.r.t. alleged dubious companies providing accommodation entries used by the assessee. ITAT observed that the Assessing Officer had duly issued notice u/s 133(6) to the above said parties and all consequent necessary confirmation and compliances have been made. The assessing officer thereafter had not brought on record result of any further enquiry made. The AO's observation from the financials of lenders submitted was in the nature of AOs surmise, devoid of any cogent enquiry as per the ITAT.*
- *In the case of Randeep Investment Pvt. Ltd vs. ITO (ITA No.4991/Del./2014) on the issue of addition u/s 68 of Rs. 30 lacs on account of share application money, the AO had during the course of assessment proceedings, issued notices u/s 133(6) to all the 8 share subscriber Companies, out of which 4 companies did not respond. ITAT noted that all the share application money have been received by account payee cheques and no adverse inference can be drawn against the assessee, even if replies were not received from the share subscribers Companies though the notices u/s 133(6) were duly served on them. ITAT held that assessee Company produced sufficient documentary evidence including the confirmations, bank statements, balance sheets, PAN, etc. of the share applicants and hence, the onus laid on the assessee to prove the identity, genuineness and creditworthiness of the share subscriber Companies stood duly discharged by it.*
- *In the case of Sonicwall Technology System India Pvt. Ltd. Vs ACIT (ITAT Mumbai ITA no. 3860/Mum./2019), the ITAT observed that when the assessee has provided all the information available with it regarding the transaction, merely on the basis that the entity has not responded to notice issued under section 133 (6) of the Act the transaction cannot be doubted and be treated as non-genuine. Further, it was also nto the claim of the revenue that these parties were non-existent. ITAT found no basis for upholding addition made by the AO merely on the basis that 2 out of 17 parties failed to respond to notice u/s 133(6).*

The above judgement of Hon'ble ITAT, Mumbai relied upon by the appellant was carefully gone through and considered and it was found that ratio of the decisions

are applicable on the facts and circumstances of the instant case of the appellant that when the assessee has provided all the information required to substantiate/justify the transaction, the Ld. AO merely on the basis that the entity has not responded to notice issued under section 133 (6) of the Act, the transaction cannot be doubted and be treated as non-genuine.

The Jurisdictional HIGH COURT OF BOMBAY in case of Principal Commissioner of Income-tax vs Jagdish Thakkar [2022] 145 taxmann.com 414 (Bombay), held as under :

"Para 27. The Assessee in our view has discharged his onus in respect of the subject purchases. The Assessing Officer has also not doubted the sales arising out of the said export activity and its GPR. This is not a case which falls within the ambit of Section 69C as held by the Assessing Officer."

THE ITAT MUMBAI BENCH in case of Welspun Steel Ltd vs Deputy Commissioner of Income-Tax [2023] 152 taxmann.com 62 (Mumbai - Trib.), held as under "

"Para 4.9...it could be safely concluded that assessee company had duly discharged its complete onus with regard to section 68 of the Act. Hence, there could not be any addition u/s.68 of the Act even on merits on protective basis or on substantive basis. Hence, we hold that the Id. CIT(A) had rightly deleted the addition made u/s.68 of the Act in the hands of the assessee company on merits also. Accordingly, the ground No. 1 raised by the Revenue is dismissed."

- Unless and until the documentary evidences as filed by the assessee to prove the identity, genuineness and creditworthiness is not controverted or disproved by the AO by bringing some material on record, the onus which lay on the assessee stood discharged and the addition made u/s 68 of the I T Act could not be sustained. Such ratio has been held in case of C/T vs. KamdhenuSteels and alloys Ltd. (361 ITR 220), ITAT Delhi Bench order in the case of ACIT vs. M/s TRN Ennergy Pvt. Ltd., ITAT Delhi Bench order in the ease of Central Circle vs. M/s Ravnet Solutions Pvt. Ltd., ITAT Delhi Bench Quinine case-of ITO vs. M/s Nishit Fincap Pvt. Ltd., and, ITAT Delhi Bench order m the case of CIT vs. M/s Pinku Landfin Pvt. Ltd.

The above judgement of Hon'ble Jurisdictional Bombay High Court and Hon'ble ITAT, Mumbai relied upon by the appellant, was carefully gone through and considered and it was found that ratio of the decisions are applicable on the facts and circumstances of the instant case of the appellant that once the assessee has been able to discharge his primary onus, then the onus/burden of proof shifted on the AO to disprove/controvert the material evidence furnished by the assessee as otherwise by bringing new material evidence by conducting enquiry/verification.

Further, it is important to mention here that the Ld. Assessing Officer has conducted the detailed enquiry during the remand proceeding and proposed the addition of Rs.1,25,51,607/- instead of Rs.4,41,21,079/- as was originally added in the assessment order dt. 30-12-2016 passed u/s 143(3) of the Income Tax Act,

1961, after considering the written submissions filed by the appellant and enquiry conducted during the remand proceeding.

Therefore, after the careful consideration of the above narrated facts, circumstances of the case, the submissions of the Appellant remand report of the Ld. Assessing Officer and respectfully following the ratio of Hon'ble Jurisdictional Bombay High Court (supra) and various Judgement of Hon'ble ITAT(supra), the ground of appeal is partly allowed and the addition of Rs. 2,24,191/- is accordingly confirmed on account of difference in balance of various sub contractor and addition of Rs.4,38,96,8887- is accordingly deleted.”

5. Aggrieved with such order of CIT(A) / NFAC, the assessee is in appeal before the Tribunal.

6. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and Id. CIT(A) / NFAC and the paper book filed by both the sides. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case made an addition of Rs.4,41,21,079/- being payment made to 13 sub-contractors on the ground that the notices u/s. 133(6) of the Act were issued to the parties but no reply was received. We find before the Id.CIT(A) the assessee filed all the relevant details, based on which the CIT(A) called for remand report from the Assessing Officer, who in the remand report proposed an addition of Rs.1,25,51,607/- as against Rs.4,41,21,079/- added by him in the assessment order. We find the Id.CIT(A), after considering the remand report of the Assessing Officer and rejoinder of the assessee to such remand report, restricted the disallowance to Rs.2,24,191/- by passing a speaking order, details of which are already reproduced in the preceding paragraphs. The Id. DR could not point out any mistakes in the order of Id.CIT(A) while deleting the addition made by the Assessing Officer except the difference of Rs.2,24,191/- as

pointed out by him as per page 45 of his order. Since the order of CIT(A) in the instant case is a speaking order giving the reasons for such deletion after considering the remand report of the Assessing Officer, who himself has reduced such disallowance to Rs.1,25,51,607/- as against Rs.4,41,21,079/- originally added by him, and since Id.CIT(A) has given party-wise explanation while deleting the addition, therefore, we do not find any infirmity in the order of the CIT(A) in restricting the addition to Rs.2,24,191/- as against Rs.1,25,51,607/- proposed by the Assessing Officer in the remand report. Accordingly, the order of the CIT(A) is upheld and the grounds raised by the Revenue are dismissed.

7. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the open Court on 10th July, 2024.

Sd/-

(ASTHA CHANDRA)
JUDICIAL MEMBER

Sd/-

(R. K. PANDA)
VICE PRESIDENT

पुणे Pune; दिनांक Dated : 10th July, 2024

GCVSR

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent
3. DR, ITAT, 'A' Bench, Pune
4. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे
/ ITAT, Pune

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	04.07.2024		Sr. PS/PS
2	Draft placed before author	05.07.2024		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement on			Sr. PS/PS
7	Date of uploading of Order			Sr. PS/PS
8	File sent to Bench Clerk			Sr. PS/PS
9	Date on which the file goes to the Head Clerk			
10	Date on which file goes to the A.R.			
11	Date of Dispatch of order			