

IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHINBENCH:COCHIN

BEFORE SHRI PRASHANT MAHARISHI, VICE PRESIDENT  
AND  
SHRI KESHAV DUBEY, JUDICIAL MEMBER

ITA No. 853/Coch/2023
AssessmentYear:2017-18

M/s. Aryacon PMC, 16/516, City Estate, MC Road Perumbavoor 683542 Kerala  <b>PAN NO :AAJFA6034B</b>	<b>Vs.</b>	The Assistant Commissioner of Income Tax Circle - 1, Aluva Kerala
<b>APPELLANT</b>		<b>RESPONDENT</b>

<b>Appellant by</b>	:	Shri. Thomas Joseph, CA
<b>Respondent by</b>	:	Smt. Leena Lal, Snr AR

<b>Date of Hearing</b>	:	04.12.2024
<b>Date of Pronouncement</b>	:	06.01.2025

**O R D E R**

**PERKESHAV DUBEY, JUDICIAL MEMBER:**

This appeal at the instance of the assessee is directed against the order of Id. CIT(A)/NFAC dated 11.10.2023 vide DIN & Order No.ITBA/NFAC/S/250/2023-24/1056975090(1) for the Assessment Year (in short "AY") 2017-18 passed u/s 250 of the Income Tax Act, 1961 (in short "The Act").

2. The assessee has raised the following grounds of appeal:

GROUND OF APPEAL

1. The orders of the Hon'ble CIT (Appeals) and Assistant Commissioner of Income Tax, Circle 1, Aluva is against law and facts of the case and hence unsustainable.
2. The learned authorities below erred in making an addition of Rs. 1,02,24,936 as retention money withheld which is against the Income Tax Act and ICDS-III Construction Contracts.

3. The learned authorities below ought to have considered the fact that the appellant has followed the mercantile system as well as ICDS, where under both income recognition should be done at a time when there is a reasonable certainty of its ultimate collection. Collectable amounts of the performance guarantee retentions are not ascertainable at the time of completion of the contract, and they are recognized as income when there is reasonable certainty about its collection, i.e., on expiry of the performance guarantee period as mentioned in the agreement.
4. The learned authorities below ought to have considered that certainty about the ultimate collection of Rs. 1,02,24,936 which is withheld as performance guarantee accretion is ascertained during the FY 2018-19 and FY 2019-20 where the performance guarantee period has expired and the appellant has offered the receipts for the FY 2016-17 as income of the FY 2018-19 for Rs, 99,71,078 and in the FY 2019-20 for Rs.3,18,125 and assessing income in the AY 2017-18 result in taxing the same income twice which is against natural justice.
5. The learned authorities below ought to have understood the fact that Sec 43CB as well as ICDS has specified that contract revenue shall include retention money but does not mention that accrual of retention monies has to be in the year in which the related work is completed whereas the ICDS - III specifies that contract revenue shall be recognized as and when there is reasonable certainty of its ultimate collection.
6. The learned authorities below ought to have considered clarification by CBDT through circular No. 10/2017 dated 23-03-2017, FAQ No.11 that Retention money shall be recognised as revenue subject to a reasonable certainty of its ultimate collection condition contained in para 9 of ICDS-III on construction contracts.
7. And such other grounds, arguments or points that may be submitted, urged or enlarged at the time of hearing.

3. Brief facts of the case are the assessee was a partnership firm (currently converted to a Company) engaged in civil construction work with major works related to Kerala State Electricity Board (KSEB) and other government departments. As claimed by the assessee, for every contract work, the awarder deducts performance retention money which will be released only after satisfactory performance of the contract which is kept as Performance Guarantee by the awarder. Payment regarding such deductions towards performance guarantee is made after the period mentioned on the agreement and only if the performance is satisfactory. There is no certainty about the collection of such amounts at the time of

completion of the contract and also the ultimate collection of such amounts is not reasonably ascertained at the time of completion of the contract.

3.1 Since the ultimate collection amount of performance retentions are not ascertainable at the time of completion of the contract, the assessee recognized the same as income when there is a reasonable certainty about its collection i.e. on expiry of the performance guarantee period as mentioned in the agreement. The performance retention against the contracts completed during the FY 2016-17 was Rs. 1,02,24,936/- and also the assessee has accounted Rs. 10,06,691/- as contracts received during the current AY being the retention withheld in earlier years received during the current AY as income.

3.2 For the AY 2017-18, the assessee firm filed its return of income declaring a total income of Rs. 84,04,650/-. Thereafter the case was taken up for scrutiny. The main reason for selection was "Real-estate business with high closing stock and higher turnover reported in service tax returns compared to ITR". Accordingly, notices u/s. 143(2) as well as 142(1) of the Act was issued along with a questionnaire asking to submit various details and information. During the course of assessment proceeding, the assessee submitted a reconciliation statement for Service tax return (Rs. 13,08,66,198/-) and ITR (Rs. 12,16,47,953/-). The AO observed that the assessee had omitted Rs. 1,02,24,936/- being retention withheld and added Rs. 10,06,691/- being retention received during the current year for the past year. In the opinion of AO these are to be accounted in the mercantile system only and therefore held that the retention money withheld is to be taken as income of FY 2016-17. Accordingly, the income credited in the ITR was enhanced by Rs. 1,02,24,936/-. However, for want of details as

to whether the retention money received(Rs.10,06,691/-) now has been accounted for in any earlier year, the deduction is not allowed. Thereafter the AO completed the Assessment u/s 143(3) of the Act on a total assessed income of Rs. 1,86,29,586/-.

4. Aggrieved by the assessment completed by the AO u/s 143(3) of the Act dated 01.12.2019, the assessee has preferred an appeal before the Id. CIT(A) / NFAC.

5. The Id. CIT(A) / NFAC after considering the assessment order as well as submission of the assessee, the appeal filed by the assessee was dismissed on the grounds that the amount was actually received by it in the subsequent assessment year does not have any relevance because the assessee has maintained its account on mercantile basis. Further, Id. CIT(A) / NFAC was of an opinion that section 43CB of the Act and the notification of ICDS III has come into effect from AY 2017-18. Since specific provision has been brought into the act from AY 2017-18, the case law relied upon by the assessee are not relevant in determining the taxability of retention money in the case of the Contractors.

6. Aggrieved by the order of the Id. CIT(A)/NFAC dated 11.10.2023, the assessee has filed the present appeal before this Tribunal. The assessee has also filed a paper book comprising of 62 pages certifying that no fresh evidences are being submitted before the ITAT except the case of Shri P.A.Jose vs. Union of India relied upon by the assessee.

7. Before us, Id. A.R. of the assessee vehemently submitted that the assessee has followed both the mercantile system of accounting as well as ICDS- III in which the income recognition should be done at the time when there is a reasonable certainty of its ultimate

collection. The collectible amount of the performance guarantees retentions are not ascertainable at the time of completion of the contract and they are recognized as income when there is a reasonable certainty about its collection. Further, it is submitted that the assessee is following this method consistently and the revenue has also accepted the same in the past. Further Id. AR of the assessee submitted that the ICDS are not applicable for the AY 2017-18 in view of the judgment of the jurisdictional High Court in the case of P. A. Jose vs. Union of India (WP(C) No. 30318 of 2019, High Court of Kerala).

**8.** The Id. DR on the other hand supported the orders of the authorities below and submitted that the judgment relied upon by the assessee in the case of P. A. Jose vs. Union of India (supra) is only with regard to ICDS-II that too more particularly with respect to opening and closing stock of the year is to be valued by applying the same methodology. The Id. DR also submitted that when the specific provision U/s 43CB has been brought into the Act w.e.f. the AY 2017-18 that the contract revenue shall include the retention money, then there is no question of retention money being excluded from the turnover.

**9.** We have heard the rival submissions and perused the materials available on record. The dispute in the present case is with regard to the taxability of performance retention. It is an undisputed fact that the assessee is following the accrual method of accounting consistently wherein, once there is reasonable certainty of the ultimate collection of the retention money, it is included in the income. The revenue has also accepted the method of accounting followed consistently by the assessee in the past. During the year under consideration, the performance retention against the contracts completed during the FY 2016-17 is Rs. 1,02,24,936/-.

The AO added Rs. 1,02,24,936/- as retention money withheld as income of the assessee. The assessee claims that the ultimate collection of Rs. 1,02,24,936/- which is withheld as performance retention is ultimately ascertained during the FY 2018-19 and 2019-20 where the performance guarantee period has expired and the assessee has also offered performance retention for the FY 2016-17 as income of the FY 2018-19 amounting to Rs. 99,71,078/- and in FY 2019-20 amounting to Rs. 3,18,125/-. Before us, the AR of the assessee submitted that the assessee has already offered the income in subsequent assessment years & therefore the same may not be subjected to tax again this year.

**9.1** Before proceeding further, it is apposite here to take note of section 43CB of the Act for the purpose of this case which are reproduced below for the ease of reference and convenience:

***“Computation of income from construction and service contracts.***

**43CB.** (1) *The profits and gains arising from a construction contract or a contract for providing services shall be determined on the basis of percentage of completion method in accordance with the income computation and disclosure standards notified under sub-section (2) of [section 145](#):*

*Provided that profits and gains arising from a contract for providing services,—*

- (i) with duration of not more than ninety days shall be determined on the basis of project completion method;*
- (ii) involving indeterminate number of acts over a specific period of time shall be determined on the basis of straight line method.*

(2) *For the purposes of percentage of completion method, project completion method or straight line method referred to in sub-section (1)—*

- (i) the contract revenue shall include retention money;*
- (ii) the contract costs shall not be reduced by any incidental income in the nature of interest, dividends or capital gains.”*

The above computation of income from construction and service contracts is inserted by the Finance Act, 2018 with retrospective effect from 01.04.2017 and will accordingly apply from the AY 2017-18. On plain reading of the provision above, it is clear that the contract revenue shall include retention money.

9.2 We take a note of the fact of the judgment of Hon'ble High court of Delhi in the case of The Chamber of Tax Consultants &Anr. V. Union of India & Ors. (DEL-HC) : (2017) 400 ITR 178, in relation to ICDS – III the relevant paragraph is reproduced below:

**“ICDS III**

69. Turning now to ICDS-III which relates to construction contracts, para 10 thereof states that retention money would be a part of the contract and the same has to be assessed to tax based on “proportionate computation” method. This is reiterated in answer to Question No. 11 in Circular No. 10 of 2017.

70. The above justification is contrary to the law explained in the following decisions:

(i) *CIT v. Simplex Concrete Piles India (P) Ltd* (1988) [179 ITR 8](#) (ii) *CIT v. P & C Constructions (P) Ltd* (2009) [318 ITR 113](#)

(iii) *Amarshiv Construction (P) Ltd v. DCIT* (2014) [367 ITR 659](#) and (iv) *DIT v. Ballast Nedam International* (2013) [355 ITR 300](#) which followed the decision in *Anup Engineering Limited v. CIT* (2000) [247 ITR 114](#).

71. All the above decisions hold that the retention money does not accrue to an Assessee until and unless the defect liability period is over and the Engineer-in-Charge certifies that no liability is attached to the Assessee.

72. The ICST Committee noted what was sought to be done by the Tax AS proposed as ICDS as under:

“AS-7 is silent about treatment of accrual of income in respect of the retention money. There are some judicial pronouncements holding that the retention money is not deemed to have accrued for tax purposes. To overcome this unintended meaning, the TAS (CC) specifically provides that the retention money shall accrue to the person for computing revenue based on the percentage of completion method.”

73. The stand of the Respondent seems to be that since retention money is treated as part of the revenue, it should also be considered as part of the income. The Respondent argues that it intends to bring uniformity between the accounting treatment and the tax treatment of retention money. The Respondent relies upon *Rotork Controls Pvt. Ltd. v. CIT* (2009) [314 ITR 62](#) which states that a provision for present obligations in respect of past events is allowed.

74. Paragraph 10 does not specify as to at what stage retention money would be treated as ‘contract revenue’. Obviously the amount has to accrue as income. That is fundamental to the law of income tax. An analysis of the case law and the stand of the Petitioner and the Respondent clearly reveals that the treatment to be given to retention money depends upon the facts of each case and the conditions attached to such amounts. It would also depend upon the contractual terms between the contractor and the person awarding the contract. The treatment to retention money under Paragraph 10 (a) in ICDS-III will have to be

*determined on a case to case basis by applying settled principles of accrual of income. By deploying ICDS-III in a manner that seeks to bring to tax the retention money the receipt of which is uncertain/conditional, at the earliest possible stage, the Respondents would be acting contrary to the settled position in law as explained in the above decisions.”*

**9.3** We also take note of the fact that Hon'ble High Court of Delhi in the above judgment, struck down the Notification Nos. 87 and 88 of 2016 dated 29.09.2016 and Circular No. 10 of 2017 issued by the Central Board of Direct Taxes as ultra vires the Act.

**9.4** In order to bring certainty in the wake of various judicial pronouncements on the issue of applicability of ICDS, a new section 43CB was inserted in the Income-tax Act to provide that profits arising from a construction contract or a contract for providing services shall be determined on the basis of percentage of completion method except for certain service contracts, and that the contract revenue shall include retention money, and contract cost shall not be reduced by incidental interest, dividend and capital gains.

**9.5** The purposes of inserting 43CB with retrospective effect from 01.04.2017, is to apply the same in relation to AY 2017-18 and subsequent assessment years is provided in the memorandum explaining the provisions in the Finance Bill, 2018 as under:

*“Recent judicial pronouncements have raised doubts on the legitimacy of the notified ICDS. However, a large number of taxpayers have already complied with the provisions of ICDS for computing income for assessment year 2017-18. In order to regularize the compliance with the notified ICDS by a large number taxpayers so as to prevent any further inconvenience to them, these amendments take effect retrospectively with effect from 1st April, 2017 i.e. the date on which the ICDS was made effective and will, accordingly, apply in relation to assessment year 2017-18 and subsequent assessment years.”*

**10.** After going through the above, we are of the considered opinion that the assessee was following Mercantile system of accounting and had to account for all the receipts on accrual basis and accordingly, the retention money could not be excluded specially when there is express provision in the Act itself brought in by the Finance Act, 2018 w.r.e.f. 01.04.2017. The assessee cannot contend that they will not follow the law and will adopt a particular method of offering retention money to tax, despite the change in law by the competent legislature i.e. Parliament. We agree with the view of the Id. CIT(A) / NFAC that the amount of retention money was actually received by it in the subsequent assessment years does not have any relevance because the assessee has maintained its account on mercantile basis. Since specific provision has been brought into the Act w.e.f. AY 2017-18, the case laws brought in by the assessee are not relevant in determining the taxability of retention money in the case of a contractor. Before 01/04/2017 there was no mandatory provision with regard to taxability of the Retention money. We are of the view that section 43CB as well as the ICDS-III applicable for the relevant assessment years clearly state that contract revenue shall include the retention money and therefore, we find no merits in the submission of the AR of the assessee.

**10.1** Further, the judgment of jurisdictional High Court relied upon by the assessee in the case of P.A. Jose vs. Union of India (supra) is distinguishable from the present facts and circumstances of the case as in the above case, the assessee was engaged in the business of trading of jewellery and articles of gold and has been consistently valuing its stock / inventory at a lower cost or market value determining cost using the last in first out (LIFO) method. The Hon'ble High Court of Kerala held that the retrospective amendment in substituting Sec. 145A would not apply to those assessee who

had not applied first in first out (FIFO) method in valuing their stock in the AY 2017-18, as these assessee have been following LIFO consistently and had filed their returns before the Finance Act, 2018 was enacted. Therefore, the Hon'ble jurisdictional High Court held that the stipulation under clause 16 of the ICDS (II) for the adoption of FIFO or weighted average cost for valuation of the stock / inventory cannot be applied in the assessment year 2017-18 for the valuation of opening stock as the opening and closing stock of the year is to be valued by applying the same methodology.

**10.2** In view of the above discussion and considering the express provision in the Act, by way of insertion of Section 43CB by the Finance Act, 2018 w.r.e.f. 01.04.2017, we held that the contract revenue shall comprise of retention money if any.

**10.3** Further, before us as the AR of the assessee has claimed that the withheld performance retention of FY 2016-17 relevant for AY 2017-18 amounting to Rs.1,02,24,936/- were offered to tax in the AY 2019-20 amounting to Rs. 99,71,078/- and in the AY 2020-21 amounting to Rs. 3,18,125/-, we are remitting this issue to the file of AO for the limited purpose of examining whether such amount were offered to tax as mentioned above in AY 2019-20 and 2020-21 and we further direct the AO to delete the same if found offered to tax in those assessment years as in our view it would amounts to double taxation. We also direct the AO to pass consequential appeal effect orders for the AY 2017-18, 2019-20 & 2020-21. It is ordered accordingly. The addition of performance retentions amounting to Rs.1,02,24,936/- for the AY 2017-18 is accordingly confirmed.

**In the result, appeal filed by the assessee is partly allowed for statistical purposes.**

Order pronounced in the open court on 6<sup>th</sup> Jan, 2025

**Sd/-  
(Prashant Maharishi)  
Vice President**

**Sd/-  
(Keshav Dubey)  
Judicial Member**

Bangalore,  
Dated: 6<sup>th</sup> Jan, 2025.  
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5. Guard file

By order

**Asst. Registrar,  
ITAT, Cochin.**